

A
PRACTICAL TREATISE
OF THE
LAW OF EVIDENCE,
&c.

VOL. I.

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PRACTICAL TREATISE
OF THE
LAW OF EVIDENCE,
AND
DIGEST OF PROOFS,
IN
CIVIL AND CRIMINAL PROCEEDINGS.

THIRD EDITION,
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

By THOMAS STARKIE, Esq.
OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL.

VOL. I.

LONDON:
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ADVERTISEMENT TO THE THIRD EDITION.

THE Author, in publishing a New Edition of his Treatise on Evidence, cannot but express his concern that he has not been able by doing so at an earlier opportunity to comply with the wishes expressed by many members of the Profession after the Book had been out of print. He trusts that his endeavours to improve the Work will serve to manifest his sense of the favour with which the former Editions have been received, as well as his earnest wish that the present may be deemed worthy of similar indulgence.

ADVERTISEMENT TO THE SECOND EDITION.

THE Author duly impressed with the kind reception which the First Edition of this Treatise has met with from the Profession, and the intimations which he has received that a New Edition would be acceptable, has to regret that he has not been able to comply with them at an earlier opportunity. He begs leave to add, that the delay is in a considerable degree attributable to his anxiety to improve the structure of the original work, and he trusts that the numerous alterations and additions that he has made, will be sufficient to evince his earnest desire to render the present Edition useful to the Profession.

P R E F A C E

TO THE FIRST EDITION.

THE investigation of truth, the art of ascertaining that which is unknown from that which is known, has occupied the attention, and constituted the pleasure as well as the business of the reflecting part of mankind in every civilized age and country. But inquiries of this nature are nowhere more essential to the great temporal interests of society than where they are applied to the purposes of judicial investigation in matters of fact. Their importance is obviously commensurate with the interests of justice and of right; the best and wisest laws are useless until the materials be provided upon which they can safely be exercised; in other words, the administration of a law assumes the truth of the facts or predicament to which it is applied.

With those who regard law as a science which rests on certain fixed and equitable foundations, and who view its decisions not as arbitrary precedents, but valuable only as they illustrate the great principles from which they emanate, this branch of jurisprudence, which comprises the rules and practice of judicial investigation, must exceed all others in point of interest. However widely different codes may vary from each other in matters of arbitrary positive institution, and of mere artificial creation, the general means of investigating the truth of contested facts must be common to all. Every rational system which provides the means of proof must be founded on experience and reason, on a well-grounded knowledge of human nature and conduct, on a consideration of the value of testimony, and on the weight due to coincident circumstances. Here, therefore, the object of the law is identified with that of pure science; the common aim of each is the discovery of truth; and all the means within the reach

of philosophy, all the connections and links, physical or moral, which experience and reason can discover, are thus rendered subservient to the purposes of justice. In different systems of law, the great principles on which the rules of evidence depend may be and are variously modified; but every departure from those principles, wheresoever it occurs, must constitute a corresponding and commensurate imperfection.

Notwithstanding, however, the universality of the great principles of the science, it is essential in practice to guard and limit the reception of evidence by certain definite and positive rules. Nature has no limits; but every system of positive law must, on grounds of policy, prescribe artificial boundaries, even in its application to a subject which from its independent nature least of all admits of such restraint. These, however, are necessarily for the most part of a negative description, the effect of which is to exclude evidence in particular cases, and under special circumstances, on general grounds of utility and convenience; yet even here so difficult is it to prescribe limits on such a subject, without the hazard of committing injustice, that rules, the general policy of which is obvious, are by no means favoured. Thus, although according to the Law of England he who is interested is also incompetent to be a witness, yet the Courts are ever anxious to apply the objection, as natural reason would apply it, to the credibility rather than to the competency of a party; to receive and to weigh his testimony, rather than wholly and peremptorily to exclude it. It is true, that in many instances the law may by rules of a positive nature annex a technical and arbitrary effect to particular evidence, which does not actually appertain to it. Thus, by our law, a judgment is frequently absolute and conclusive evidence of the facts which have been already contested; but one general observation is applicable to this and to most instances of a similar nature, including the numerous cases of legal presumption, that they are not used as the means or instruments of truth, but are in virtue and effect nothing more than mere technical and positive rules, which are wholly independent of the principles of evidence (*), and whose only foundation is their general utility and convenience.

(*) See the observations on this subject, under the title *PRESUMPTION*.

To go farther, and by any positive and arbitrary rules to annex to particular evidence any technical and artificial force which it does not naturally possess, or to abridge and limit its proper and natural efficacy, must in all cases, where the object is simply the attainment of truth, not only be inconsistent and absurd in a scientific view, but what is worse, would frequently be productive of absolute injustice (*). To admit every light which reason and experience can supply for the discovery of truth, and to reject that only which serves not to guide, but to bewilder and mislead, are the great principles which ought to pervade every system of evidence. It may safely be laid down as an universal position, that the less the process of inquiry is fettered by rules and restraints, founded on extraneous and collateral considerations of policy and convenience, the more certain and efficacious will it be in its operation.

To pursue such general observations further in this place would interfere too much with the arrangement of the present work, the objects of which are now to be announced.

It is proposed in the following Treatise to consider the practice of the law in England on the subject of judicial proofs. With this view, the elementary principles by which the admissibility of evidence to prove matters of fact before a Jury is governed will first be considered. A second division will contain an enumeration of the different instruments of evidence. In a third, the application of these principles and instruments to the purposes of proof will be considered, as also the distinction between law and fact, and the force and effect of direct and circumstantial evidence; and, lastly, the evidence essential to the proof of particular issues will be detailed, and references made to the leading decisions connected with the particular subject of proof.

Nothing can be more agreeable than to compare the Law of Evidence as it now exists, with the rude practice which formerly prevailed, when its principles were so dubious and unsettled, that the very means devised for the discovery of truth and advancement of justice were not unfrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression. Whoever institutes that comparison will find

(*) See tit. PRESUMPTION.

great reason to approve of the changes which have taken place; but no mistake can be more injurious to the Law, as a system, or oppose a greater obstacle to all future improvement, than to suppose that the Law of Evidence has attained to its highest perfection. It is, however, far from the Author's present purpose to enter into any discussion on the subject of the imperfections and anomalies which yet encumber this branch of the Law. To the learned judges of modern times the highest praise is due for the strenuous exertions which they have made to reduce the Law of Evidence to a system, founded on just and liberal principles; and it is to be hoped not only that those imperfections which still subsist, which have been spared from their antiquity, and exist as a kind of prescriptive evils, will in time be removed by legislative, if they be beyond the reach and scope of judicial authority; but that such other improvements will be made as reason exercised on mature experience shall warrant.

ANALYSIS

OF THE

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Vol. I. consists of three Parts ;—

- I. Containing the general principles of the Law of Evidence.
- II. The instruments of evidence, as regards
 - The mode of procuring them.
 - of using them.
 - Their effect.
- III. The application of the above principles and instruments to the proof of issues generally.

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ERRATA, VOL. I.

Page 123, line 10, for "at the time," read "the name."

- 346, last line but two, for "checks," read "clerks."
 - 418, line 12, *delete* the words "and therefore."
 - 473, line 6, to the words "by plea in abatement only," add "or by the proceeding now substituted for such plea."
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ERRATA, VOLS. II. III.

Page 55, line 4, for "distributing," read "marshalling."

- 103, note (*f*) *Cope v. Rowlands*, for "2 M. & M." read "2 M. & W."
- 120, line 21, for "c. 36," read "c. 46."
- 123, note (*u*), for "two or three," read "two of them."
- 161, line 8, for "being the," read "being as the."
- 172, note (*t*), for "evidence of an act," read "notice of an act."
- 351, note (*t*), for "an instrument of trade," read "in restraint of trade."
- 597, last line but two, for "2 Haw. c. 17," read "2 Haw. c. 14."
- 889, line 11, for "under the general issue," read "under the proper issue."
- 911, note (*h*), for "less objectionable," read "unobjectionable."
- 974, note (*s*), after the words, "let the land," insert the words "which the defendant had before rented from them."
- 1045, line 20, for "35 s." read "5 l."
note (*a*), for "1 Mo. & R. 113," read "1 Mo. & R. 115."
- 1251, line 4, for "2 & 3 Will. 4, c. 1," read "2 & 3 Will. 4, c. 71."
- 1415, after "*Raymond v. Fitch*," add, "and see *Powell v. Hees*, 7 Ad. & Ell. 426."

L A W

OF

E V I D E N C E.

EVERY system of municipal law consists of *substantive* and *adjective* provisions.

Substantive, which define primary (*a*) rights (*b*) and duties; adjective, which provide means for preventing or remedying the violation of substantive provisions.

If all were both able and willing to fulfil the substantive provisions of the law, those which are merely adjective would be unnecessary. But without adjective provisions for *preventing* and *remedying* violations of the mandatory branches of the law, by imposing actual restraint in some instances, and annexing penal or remedial consequences to disobedience, in others, such laws would be of no greater, frequently of less effect, than mere moral precepts. It is of the very essence of a municipal law, not only to prescribe a rule of conduct, but to compel obedience, either by actual restraint, or by annexing such consequences to disobedience as are on the whole the most convenient, so that any addition or excess would be productive of more evil than good.

(*a*) That is, which exist independently of any violation of a law, as contradistinguished from those which are consequent upon disobedience. Thus the right of personal liberty is a substantive primary right, as contradistinguished from a right to damages for imprisonment, which results from a violation of the primary right.

(*b*) Right, in its primitive legal sense, is that which the law directs: in popular acceptation, that which is so directed for the protection or advantage of an individual, is said to be *his* right.

When it is said that *A.* has a right to an

estate or to damages, it is meant, that under the circumstances the law directs that he shall have that estate or shall have damages. When it is said that *B.* has a right of action, it is meant, that the law under the circumstances provides means for enforcing his claim.

When the learned author of the *Commentaries*, in the language of the civil law, speaks of the *rights of things*, he uses the term in its primitive sense, and treats of those legal incidents which the law prescribes as to things, such as possession, enjoyment, succession, or transfer.

Such adjective provisions are either *preventive* or *remedial*.

Preventive, which are devised for the actual prevention of violations of the law ;

Remedial, which are devised for the purpose of repairing the consequences of disobedience.

Preventive provisions, again, are either such as are designed to prevent violations of the law by interposing actual forcible corporeal restraint ; as where one is prevented by force from doing some special injury to the person or the property of another, or is restrained from doing mischief generally by imprisonment ; or they are such as operate on the mind by the fear of *penal consequences* annexed to defined transgressions(c).

Remedial, which afford a remedy or reparation in respect of some violation of right, consist either in awarding specific restitution, as by an actual restoration of goods wrongfully detained from the owner ; or in giving damages co-extensive with the particular injury.

In order to annex either remedial or penal consequences to their proper predicaments in fact, it is essential that the true state of facts should be *investigated* by competent means ; that the legal consequences appertaining to such ascertained facts, as previously defined by the law, should be declared by *judicial* authority ; and

(c) A wrong, the subject of legal visitation, consists abstractedly in the mere privation of right: the boundaries of right and wrong, in a legal sense, are identical, and to define the limits of the one is to define the limits of the other. This consideration by no means dispenses with the definition of particular wrongs and their consequences ; so far from it, that in practice mere adjective provisions, by defining wrongs and their consequences, in fact, define and determine not merely the value but the extent of the right. And this must be the natural if not the necessary consequence of a system, which depends in a great measure on precedent and usage: for instance, the law directs generally that a man has a right to his reputation, but the extent of the right and its value depend upon the extent to which that right is protected by annexing remedial or penal consequences to invasions of that right. To say that a man is a thief is actionable ; it is a wrong in contemplation of law, and therefore to that extent the party has a *right* to his reputation in the first instance,

and a *right* to damages for the violation of right in the second. But to say that a man is a drunkard or a swindler is *per se* neither actionable nor indictable, consequently to say so does not constitute a *wrong* in a legal sense ; and therefore in this respect a man has not a legal right. And therefore, though wrong be generally nothing more than a privation of right, yet in practice it frequently happens that the extent and limits of the right are defined by the extent and limits of the wrong. Again, the value of a legal right obviously depends on the nature and extent of the adjective provisions, whether remedial or penal, by which it is protected. Be the right in its own nature ever so precious, its practical value must depend on the efficacy of the adjective provisions by which it is guarded. To punish a wilful homicide by the infliction, not of death, but of a pecuniary fine, like the Saxon weregild, would be to render life itself precarious ; to punish theft merely by the infliction of a trifling fine, would render property of little value.

lastly, that the legal consequence, if not already annexed, should be actually annexed by an *executive* process.

To the *investigative* process, again, it is essential that the parties should by their pleadings mutually state what each deems to be essential to his claim or charge, or defence, and that each should be allowed to dispute or deny the statement of his adversary. By this means, if any facts be disputed, they are distinguished from the admitted facts, in order to be submitted to inquiry before the proper tribunal.

It is incumbent on the party who makes a claim or charge, to state facts which, if true, show that the charge or claim is founded in law: the law of England requires the defendant either by a demurrer to admit the facts and deny the legal consequence contended for by the plaintiff or prosecutor, or to deny the facts so alleged, wholly or in part, *or*, admitting the facts so alleged to be true, to state others, which, taken in connection with the facts already stated, show that the claim or charge is unfounded in law.

Again, where such additional facts are pleaded in defence, it is for the prosecutor or plaintiff, in his turn, either to deny some material fact so pleaded in defence, *or*, admitting those facts to be true, either to demur in law, so as to raise a mere question of law, *or* to allege additional facts; and in like manner, so long as further facts are pleaded by the one party, the other may either deny one or more of such facts, or demur, or allege further facts. It is obvious that such a series of mutual allegations, where the condition is that each which does not terminate the series must contain the averment of some new and material fact, must rapidly converge to an issue either of law or fact (*d*).

(*d*) The law, however, frequently sanctions a generality in pleading, which leaves the fact which is to be tried intermixed with most important legal considerations. For instance, the declaration in an action of trover alleges in substance nothing more than the conversion by the defendant of the plaintiff's goods; the defendant by his plea denies such conversion; and the question for the jury is,* whether the defendant has so converted the goods of the plaintiff; and this issue frequently involves not merely one or more simple facts, but difficult legal considerations, such as questions of title, the law of bankruptcy, the right of stoppage *in transitu*, and many others. It

is obvious, that such an intermixture of law and fact could not be avoided without the aid of minute and particular pleadings, in the course of which the real merits and justice of the case would frequently be embarrassed with difficulties, arising from a necessary adherence to technical rules. The science of special pleading having been frequently perverted to the purposes of chicane and delay, the Courts have, in some instances, and the Legislature in many more, permitted the general issue to be pleaded, which leaves every thing open,—the fact, the law, and the equity of the case; and though it should seem as if much confusion and uncertainty would result from

* These observations were written previous to the late material alterations in the rules of pleading.

By the law of England, questions or issues of fact thus agreed

from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other. 3 Bl. Comm. 306. *

For the finding a verdict on every issue, it is essential, in the *first* place, to know what facts, when proved, will satisfy the issue in point of law; and *secondly*, to inquire whether such facts have been proved. The office of the jury is confined altogether to the latter question; their duty is to ascertain the existence of facts by means of the judgment which they form of the credibility of witnesses, and by the inferences which they make from the circumstances submitted to their consideration. For the due discharge of this important function, they are supposed to be peculiarly well qualified by their experience of the conduct, affairs, and dealings of mankind, and the manners and customs of society. In this respect, and to this extent, the law confides implicitly in their knowledge, experience, and discretion. It interferes no further than by laying down cautionary rules to prevent the jury from being deceived or misled, by providing, as far as can be done, that the evidence of none but faithworthy witnesses shall be admitted, and by excluding all such as flows from corrupt or suspicious sources. Having done this, the rest is left to the conscience and discretion of the jury.

It is with a view to those objects that the rules of evidence are almost exclusively framed. But, in the next place, a knowledge whether particular facts, if established to the conviction of the jury, will satisfy the issue, or the allegations to be proved, is also essential to a verdict; and this is usually a question of law, and therefore within the province of the Judge. In such cases, therefore, it is for the Court to instruct the jury in point of law, to inform them what facts are essential to the proof of the issue, and that they ought to give their verdict in the affirmative or negative, according to the opinion of the jury that

the particular facts are proved or disproved.

The jury, in finding a general verdict, are bound to find it according to the just application of the law as they receive it from the Court, and their own judgment whether the facts are proved or not; and every such verdict is presumed to be founded upon the law so expounded, and the facts so found.

If the jury in a civil proceeding wilfully misapply the law, they do it at the risk and peril of an attain; a proceeding which has now fallen into disuse, and which has been superseded by a more easy and efficacious remedy* to the party injured. But the jury are not in any case, whether civil or criminal, bound to apply the law; they are always at liberty to find a special verdict, that is, to state specially what facts they find to be proved; and the remainder of that process which is essential to the verdict, that is, the application of the law to the facts so found, is left to be executed by the Court. In finding a special verdict, the jury discharge the whole of their office, for a special verdict does not contain merely a detail of the evidence given by the witnesses, but is conclusive as to the existence of all the ultimate specific facts of the case, which are essential to its determination, founded upon an examination of the credit due to the witnesses, and upon presumptions and inferences derived from all the circumstances of the case as detailed in evidence.

It is interesting to observe how nearly the law of England corresponds with the ancient Roman law in several most important points of its practical administration. In the first place, the pleadings in the practice of the Roman law were transacted before the prætor, as they are with us in the courts above, or, as it is technically called, in Bank. The plaintiff, when he had brought his adversary into court, and had not agreed with him upon an *Impar lance*, then formally (*edebat actionem*) declared against him: "Quod si nec vindices dati, nec de lite in via transactum in

* i. e. By moving for a new trial.

upon are usually to be tried by the country, that is, by a jury of twelve men, a part of the great body of the community (e).

(e) Notwithstanding the difference of opinion which has prevailed among legal antiquaries as to the origin of the English jury, there seems to be great reason for supposing that it is derived from the *patria*,

or body of suitors who decided causes in the county courts of our Saxon ancestors. That the trial *per juratum patrie* of Glanville was derived from the trial *per patriam*, as used both before and after the Conquest,

in jus venire solebat ubi actor impetrata loquendi potestate reo edebat actionem, id est indicabat qua demum actione adversus reum experiri vellet quum enim de uno eodemque facto plures saepe actiones competere eligenda erat una ea que edenda reo." Hein. A. R. v. 2, p. 227.

It must be allowed, that however our modern system of pleading may excel that of the Romans in other respects, the latter were at least entitled to the merit of conciseness; take, for instance, a declaration in *assumpsit* upon a special agreement. A Roman declaration in such a case ran thus: "Aio te mini triticum de quo inter nos convenit ob polita vestimenta tua dare oportere." It is amusing to contrast the laconic brevity of this form with a modern declaration, expanded upon the record, and amplified by counts on considerations executory and executed, work and labour, the money counts, and on an account stated.

After the declaration followed the defendant's plea, (*exceptio*), and upon that the plaintiff's replication, the defendant's rejoinder (*duplicatio*), &c., until the matter in difference was reduced to a single question of law or fact. If the whole resolved itself into a question of law, then, as upon *demurrer*, it was decided by the prætor; but if the question ultimately depended upon a disputed fact, then came the joining of issue, the "*contestatio litis*," by which the litigants put themselves to the proof of the fact by witnesses: "Festus ait, tum demum litigantes contestari litem dici, cum ordinato iudicio utraque pars diceret testes estote." Hein. A. R. 2. v. 246. The issue was then sent to be tried by *Judices*, who in many respects bore a close resemblance to an English jury. "Si enim de jure disceptabatur, ipse prætor qui dicebat extra ordinem sin de facto judex dabatur, unde formula si paret condemnna." Conf. Seneca

de Benef. III. 7. The judges were, like our jurors, private persons, selected for the trial of matters of fact upon the particular occasion. Their decision, however, was final; and instead of returning their verdict to the Court above, in order that final judgment might be pronounced, the jury themselves pronounced the sentence, according to the direction in the Formula, "*si paret condemnna*."

The principal and characteristic circumstance in which the trial by a Roman differed from that of a modern jury, consisted in this, that in the former case, neither the prætor, nor any other officer distinct from the jury, presided over the trial to determine as to the competency of witnesses, the admissibility of evidence, and to expound the law as connecting the facts with the allegations to be proved on the record; but in order to remedy the deficiency, they resorted to this expedient; the jury generally consisted of one or more lawyers, and thus they derived that knowledge of law from their own members which was necessary to enable them to reject inadmissible evidence, and to give a correct verdict as compounded both of law and fact. "Denique ut tanto minus esset periculi ne imperite judicarent, solebant aliquando iis unus aut plures iudicii socii jurisperiti adjungi, quorum consilio omnia agerent." Gell. Noct. Att. XII. 13 Conf. Sigon. Hein. A. R. lib. 4, tit. 5, s. 3. Upon the trial, the plaintiff proved his declaration or replication, or the defendant his plea or rejoinder (*duplicatio*), accordingly as the pleadings threw the burthen of proving the affirmative on the one or the other. "Ubi ad iudicium ventum, actor suam actionem et replicationem, reus exceptionem et duplicationem probabat. Nam et reus excipiendo actor fiebat." L. 1. D. de Excep. Hein. A. R. 2 V. 201.

This justly celebrated institution is not more strongly recom-

Conquest, is rendered highly probable, not only by the very description of the trial *per patriam*, yet retained, but even still more strongly by the powers, qualifications and duties incident to the *jurata patriæ* of Hen. 2. and Hen. 3. This hypothesis seems to explain many singular incidents to the early trial *per juratam patriæ*, incidents which it would be difficult, if not impossible, to account for in any other manner. The *jurata patriæ*, like the *patria*, decided on their *own knowledge*: for this purpose they were selected from the *vicinage*; those (in the case of an assize) who had no knowledge of the facts were excluded to make room for such others as were supposed to know them; and although the concurrence of twelve was essential to the verdict, yet as eleven might have been of a contrary opinion, a *majority* in effect decided: and in the case of a disputed deed, the witnesses were included among the jury, and their duty was, as it is still, in the language of our records, *Dicere veritatem*. Such incidents afford obvious reasons for supposing that juries were but selections from the *patria* or general assembly, who must have acted in the double capacity of witnesses and jurors.

Although this *jurata patriæ* differed from its original, the *patria*, both in respect of number and of the obligation of an oath, these were transitions which might not only easily be made, but which were likely to be made, and which we know actually were made, in the most ancient, perhaps, of all our courts, that is, the county court; where though, among the Saxons, and even after the Conquest, the verdict was given by the whole *comitatus*, and is still supposed to be the verdict of the suitors, yet it is in fact given by twelve jurors on oath. In the reign of H. 2, Glanville speaks of the trial *per juratam patriæ* as a known and established institution. Whether the practice of occasionally delegating the duty of decision to a select portion of the body of suitors, and that sworn, was coeval with the popular tribunal itself, or subsequently introduced for the trial of civil rights, as we know it to have been for the purpose of criminal

presentments, may be doubtful. It is probable, however, that the complete and final establishment of the jury system is attributable to many concurrent causes. In the first place, it is clear that an appeal from the *patria* to a select number was a practice of great antiquity; of this practice there is a very curious memorial in the *Monumenta Danica*, lib. 1, p. 72: "Erat universa ditio in certas paræcias sive curias divisa, hæc statim temporibus locisque per se quæque seorsim suis cum armis, patente sub Dio in campis conveniebant, aderantque ejusdem loci viri nobiles qui velut testes judicio assiderent. Ibi in medium prodibant qui contra alios litem se habere existimabant, auditisque et cognitio partis utriusque actionibus defensionibusque, conventus universus in concilium, ibat, idque temporis spatium quod interim deliberando terebatur, curam vocabant. Expensis diligenter et velutatis in partem utramque controversiis, in consessum redibant, vocatisque litigatoribus, de jure pronuntiabant. Si quis stare judicio non vellet, ad duodecim constitutos sive judices *sive arbitros* et ab his ad universæ ditionis conventum provocare ei licebat." The expression "*sive judices sive arbitros*" is singularly coincident with the doctrine in Bracton, f. 193, that the *jurata* was not liable to a conviction, as the assize was, for a false verdict, because the parties had made the *jurata* "*quasi judicem ex consensu*."

In the next place, there are evident traces of this practice in our own country; in illustration of which, the celebrated trial in the county court before Odo, bishop of Baleux, in the time of William the Conq., may be cited, where the verdict by the *patria* was required to be confirmed by the oaths of twelve selected for the purpose from the body of suitors. There are in fact many other vestiges of the (at least) occasional practice of delegating the task of decision to a select part; twelve and its multiples appears to have been a favourite number for this purpose, not only among the Saxons, but other nations of antiquity.

Again, that the modern jury are the same with the *jurata patriæ* of Glanville and

mended by its intrinsic excellence as a mode of attaining to the truth (*f*), than by considerations of extrinsic policy.

(*f*) The trial by jury possesses in many instances another advantage, which, though collateral to the main object, ought not to pass unnoticed; that is, the clearness and facility given to the administration of the adjective provisions of the law, by the

separation of law and fact; and in the simplicity which proceeds from regarding particular questions as questions of fact for the jury, rather than as questions of law to be determined by precedent.

and Bracton, their name, number and general duty, which to this day is *dicere veritatem*, sufficiently prove, although it is clear that a most important change has taken place as to the manner of exercising their important functions. Even so lately as the reign of Hen. 3 they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed, the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes*; and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact. (Bracton, f. 137). It was, however, at this period that the capacity of juries to exercise a far wider and more important function, in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of inquiry by the aid of reason and experience, for such inefficacious and unrighteous practices. From this era probably may be dated the commencement of the important changes in the functions of the jury, which afterwards, though perhaps slowly, took place, until they were modelled into the present form.

The learned author of the Commentaries is inclined to derive the modern jury immediately from the Saxons, referring to the law of Ethelred, which provides that twelve men, *etate superiores*, shall, with the *præpositus*, swear that they will condemn no innocent, absolve no guilty person. It

is clear, however, that this constitution of thirteen men was merely in the nature of a *jurata delatoria*, or jury of accusation, not of trial, for the effect of a charge by the thirteen was merely to consign the accused to the *triplex ordalium*.—Others have asserted, that the origin of the present jury was the assize established in the reign of Henry 2d. It appears, however, very clearly from Glanville's Treatise, that the jury of twelve was of more ancient origin; for it is repeatedly spoken of in that work as a known and existing institution, and as the ordinary means of inquiry in the case of purprestures, nuisances, and trespasses which did not amount to disseisins. These were then tried *per juratam patriæ sive vicineticoram justiciariis*. Glanv. l. 9, c. 11.

M. Meyer, in his truly valuable and interesting work (*Institutions Judiciaires*), is disposed to fix the origin of our juries at so late a date as that of Henry 3d. Inst. Jud. vol. 2, p. 165. But it is remarkable, that one reason which he strongly urges in support of this opinion, is the total silence of Glanville on this subject: "Dans cet ouvrage il ne se rencontre ni le nom de jury ni la chose même, quoiqu'il soit souvent question de l'assise," &c. Ins. Jud. vol. 2, p. 169. Glanville himself affords the most decisive refutation of this argument. See l. 9, c. 11, l. 14, c. 3; see also l. 2, c. 6, l. 5, c. 4, l. 7, c. 16: and consequently the hypothesis of an origin later than the time when Glanville wrote necessarily falls to the ground.

The trial by jury, though undoubtedly known and used in the king's courts in the reign of Henry 2d, had become much more frequent in the reign of Henry 3d, an æra from which its gradual change to its present form may be dated. It is not improbable, as far as regards the county

Secret and complicated transactions, such as are usually the subject of legal investigation, are too various in their circumstances to admit of decision by any systematic and formal rules ; the only sure guide to truth, whether the object be to explore the mysteries of nature, or unravel the hidden transactions of mankind, is reason aided by experience.

It is obvious, that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind : and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unincumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions (g).

court, that when its powers had been greatly abridged, the substitution of twelve jurors for the whole *comitatus* was adopted as a change of great convenience to the suitors of the court, as well as the litigant parties ; the former would be more rarely called on to perform a burthensome duty, the latter would have their causes more patiently tried.

If it was ever the practice, either previous or subsequent to the Conquest, that the verdict by the *patria* or *comitatus* should be subject to an appeal to or confirmation by twelve of the *pares* on an oath, and of this, as has been seen, some traces are to be found, the transition to the select part would be perfectly easy ; it would in effect be nothing more than the mere omission of a step in the process which had become useless and burthensome ; experience having shown that justice was better done by a limited number, acting under the obligation of an oath, than by the precarious determination of a large and indefinite body, few of whom would possess any knowledge of the facts.

(g) The Ld. Chancellor (Ld. Brougham), in a recent case, in directing an issue at law, thus expressed his opinion on the subject :

“ I certainly retain the opinion which I always held in common with all the

profession, that the best tribunal for investigating contested facts is a jury of twelve men, of various habits of thinking, of various characters of understanding, of various kinds of feeling, of moral feeling, all of which circumstances enter deeply into the capacity of such individuals. A jury is, as I have more than once observed in this place, an instrument peculiarly well contrived in two cases—of assessing damages and giving compensation in the nature of damages assessed, and finding the way for the Court, which is ultimately to decide, through a mass of conflicting testimony. The diversity of the minds of the jury, even if they are taken without any experience as jurors, their various habits of thinking and feeling, and their diversity of cast of understanding, and their discussing the matter among themselves, and the very fact of their not being lawyers, their not being professional men, and believing as men believe, and act on their belief, in the ordinary affairs of life, give them a capacity of aiding the Court in their eliciting of truth, which no single Judge, be he ever so largely gifted with mental endowments, be he ever so learned with respect to past experience in such matters, can possess in dealing with either of those two matters.”

Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolate; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal (*h*), can have no influence when entrusted to the mass of the people, to be exercised by particular individuals but occasionally.

In addition to this, no institution could be better devised for securing, on the part of the people, a lively attachment to the constitution and laws, in the practical administration of which they act so important a part, in diffusing a knowledge of the laws themselves, and producing ready obedience to a system which they know to be justly and impartially administered.

That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of *evidence*.

Where such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

The origin, nature and quality of such evidence, the principles and rules which regulate its admissibility and effect, and its application to the purposes of proof, form the subject of the present Treatise.

The brief outline which has been given to show the relation which this branch of the law bears to the whole system, is sufficient to manifest its great importance.

There is, perhaps, no greater blessing incident to a highly improved state of civilization, than the substitution of a rational and satisfactory mode of judicial proof, for the rude, barbarous, and even impious practices resorted to in the dark and unlettered ages. Without certain modes of investigating truth, in cases where its light is ever liable to be obscured by fraudulent practices exercised for the evasion of justice, the wisest laws are but vain and in-

(*h*) The power of deciding on matters of fact is much more capable of abuse, and liable to corrupt partiality, without appearing to be manifestly unjust, than the power of deciding on matters of law is. A judgment in law on ascertained facts, must be justified by comparison with precedents, and it attracts public notice, because in its turn it becomes a precedent for future decisions. It is therefore the

subject of public attention, and any material departure from ordinary principles would necessarily be remarked; but the testimony and evidence offered in proof of facts in particular instances, are capable of such infinite complexity and variety, that they admit of no certain standard for judging, and consequently a corrupt or erroneous decision is the less easy to be detected.

effectual: they may embellish the statute-book, as beautiful in theory, but in other respects they are a dead letter; frequently even worse; for where offenders cannot be detected and punished, the laws may do mischief in holding out a show of protection, which being but delusive, tends to induce a false and dangerous sense of security: what is still worse, whilst the criminal escapes, they may stamp the innocent with infamy, and crush them with judgments designed only for the guilty; and under an arbitrary constitution, may be converted into a dangerous instrument in the hands of power, for the destruction of those whose possessions are tempting, or principles obnoxious.

In order to appreciate the advantages which result from modes of investigation founded on just and rational principles, we have only to recollect the absurd, monstrous and impious practices resorted to by our own ancestors, in common with other nations of antiquity (*i*). It was for the want of them that judicial oaths were multiplied to an extent of itself sufficient to bring the obligation into contempt: it was vainly hoped that the rank and number of compurgators, who swore not to any fact, but to mere belief, would compensate for their want of knowledge. Hence the superstitious appeals to the Deity by the trial by ordeal, and the ferocious and impious practice of the trial by duel. They did not venture to rely on the simple oaths of individual witnesses to facts, although with a flagrant degree of inconsistency they gave credit to the cumulative oaths of those who knew nothing of the facts: whilst they were either too ignorant or too indolent to try the credit of witnesses by diligent examination and comparison of testimony and facts, judicial oaths were multiplied to an absurd and profligate extent. Hence also the rude limits of prescription, which were established for the purpose of avoiding the necessity for inquiry (*k*). It may, however, be recollected to their credit, that the shocking expedient of applying torture to extort confession, a practice sanctioned by many, even Christian legislators, was never resorted to by the Anglo-Saxons.

But however absurd, objectionable and mischievous such prac-

(*i*) In spite of the somewhat romantic notions which moderns are apt to entertain of the virtues and simplicity of ancient times, history teaches, what indeed our own experience might lead us to suspect, that the most rude and uneducated in every age are usually the most addicted to deceit, falsehood and perjury. See the remarks of Mr. Hume, *History of England*, vol. i. p. 222: "Whatever we may

imagine concerning the moral truth and sincerity of men who live in a rude and barbarous state, there is much more falsehood, and even perjury among them, than among civilized nations."

(*k*) If a man wounded his slave, he was not to be presumed to be guilty of the murder, unless the slave died the day after.

tices must appear at the present day, the progress of improvement has been slow; for though the trial by duel in civil suits received a considerable check in the reign of Henry II. in consequence of the introduction of the trial by the grand assize, yet the practice was continued in appeals till long afterwards, and has but very lately ceased to be the law; and though the trial by ordeal seems to have fallen into disuse ever since the early part of the reign of Henry III. without any formal abolition, the doctrine of compurgation by wager of law is but just abolished. It was not until long after the establishment of the jury trial that the investigation was conducted by the open examination of witnesses, and that the functions of jurors and witnesses were distinguished and separated; it was not until the reign of queen Anne that witnesses for prisoners tried for felony were examined upon oath.

It is not, however, part of the present design to enter into any historical detail of the law on this interesting subject, further than as reference to the ancient law may be occasionally connected with its present details.

The subject may be conveniently considered,

First. In relation to the elementary principles on which the legal doctrine rests.

Secondly. The instruments of evidence, as governed by these principles and elementary rules.

Thirdly. Their application to the purposes of proof, either generally or particularly.

First, then, as to the general principles on which the law of evidence is founded.

The means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but extrajudicial purposes. These are the best, usually the only means of inquiry, and it is for this reason that a jury of the country forms a tribunal so well qualified to judge of mere matters of fact; for, subject to certain exceptions, they decide by the aid of experience and reason, as they would do on any extrajudicial occasion. With these general principles the law can interfere in two ways only; either by excluding or restraining mere natural evidence by the application of artificial tests of truth, or annexing an artificial effect to evidence beyond that which it would otherwise possess. Hence it is that the great principles of evidence may be reduced to three classes, comprising,

1st. The principles of evidence which depend on ordinary ex-

perience and natural reason, independently of any artificial rules of law ;

2dly. The artificial principles of law, which operate to the partial exclusion of natural evidence by prescribing tests of admissibility, and which may properly be called the excluding principles of law ;

3dly. The principles of law which either create artificial modes of evidence, or annex an artificial effect to mere natural evidence.

In the first place, it rarely happens that a jury, or other tribunal (*l*), whose business it is to decide on a matter of fact, can do so by means of their own actual observation. It is obvious, that when inquiry is to be made into the circumstances of a past transaction before a jury, information must be derived for the most part from the same sources, and must be judged of and estimated, to a great extent, by the same rules that would be resorted to and applied by any individual whose business or whose interest it was, in the ordinary course of human events, to institute such an inquiry.

What, then, are the means to which a person interested in such an inquiry into a past transaction would naturally resort? He would, in the first place, ascertain what witnesses were present at the transaction, and would obtain all the information which they could supply. If none were present, or none could be found from whom he could obtain immediate intelligence, he would procure information from others, who, although they had not actual personal knowledge of the fact, had yet derived information on the subject, either directly or mediately, from others who possessed or had acquired and communicated such their knowledge, either orally or in writing.

Again, in the absence of other information on the subject, he would endeavour carefully to ascertain the circumstances which accompanied the transaction, and had such a connection with it as enabled him to draw his own conclusions on the subject of inquiry.

In short, where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a by-gone fact can be ascertained :

1st. By information derived either immediately or mediately from those who had actual knowledge of the fact ; or,

(*l*) To a limited extent, a jury or Court, in deciding matter of fact, may have actual personal knowledge. Thus a jury may have a view of lands, &c. the subject of

litigation: Judges may decide by inspection of a record, or of the person in cases of disputed infancy. So also of a jury of matrons in case of alleged pregnancy, &c.

2dly. By means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established.

In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ.

All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had, actual knowledge of the fact, may not improperly be termed *direct* evidence; whilst that which is derived merely from collateral circumstances may be termed *indirect* or inferential evidence.

It is obvious that the *means* of indirect*proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.

Such, then, being the ordinary sources of evidence (*m*), what are the *excluding* principles which restrain the admission of evidence? As juries must decide by the aid of the same general principles of belief on which any individual would act who was desirous of satisfying himself by inquiry as to the truth of any particular fact, and as an individual inquirer would not think it necessary to limit himself by any particular rules, why should the evidence to be submitted to a jury be limited or affected by any technical rules?

The answer is, that the law interferes for two purposes; first, in order to provide more certain tests of truth than can be provided, or indeed than are necessary, in the ordinary course of affairs, and thereby to exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth; and in the next place, to annex an artificial effect to particular evidence, which would not otherwise belong to it, on grounds of general policy and convenience.

(*m*) The principles on which the force and efficacy of mere natural evidence, unaffected by technical considerations, depend, will be more conveniently considered

hereafter, in discussing the application of the rules of evidence to the general purposes of proof.

The great principle on which the law proceeds in laying down rules of an exclusive operation is, not to alter the value and effect of evidence in the investigation of truth; that would be absurd, especially where the tribunal vested with the power of decision consisted of jurors selected from the great body of the people, who, being unskilled in technical rules and unaccustomed to judicial habits, must necessarily decide by the aid of their own experience of things and natural power of their reason, by principles on which they would act in the affairs of ordinary life: on the contrary, one great object of the law is to aid the natural powers of decision, by adding to the weight and cogency of the evidence on which a jury is to act. Another great object is, to prevent the reception of evidence which in its general operation would injure the cause of truth, by its tendency to distract the attention of a jury, or even to mislead them.

The necessity for resorting to superior tests of truth, the effect of which is to exclude evidence not warranted by those tests, is founded on the apprehension that the evidence on which an individual in the ordinary transactions of life might safely rely, could not, without the additional sanction of such tests, be safely relied upon, or even admitted, in judicial investigations. For in the first place, in the ordinary business of life neither so many temptations occur, nor are so many opportunities afforded for practising deceit, as in the course of judicial investigations, where property, reputation, liberty, even life itself, are so frequently at stake: in the common business of life each individual uses his own discretion with whom he shall deal and to whom he shall trust; he has not only the sanction of general reputation and character for the confidence which he reposes, but slight circumstances, and even vague reports, are sufficient to awaken his suspicion and distrust, and place him on his guard; and where doubt has been excited, he may suspend his judgment till by extended and repeated inquiries doubt is removed. In judicial inquiries it is far otherwise; the character of a witness cannot easily be subjected to minute investigation, the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real characters of the witnesses on whose testimony they are called on to decide.

It has been truly observed, that there is a general tendency among mankind to speak the truth, for it is easier to state the truth than to invent; the former requires simply an exertion of the memory, whilst to give to false assertions the semblance of truth

is a work of difficulty. It is equally apparent that the suspicion of mankind would usually depend on their ordinary experience of human veracity; if truth were always spoken no one would ever suspect another of falsity, but if he were frequently deceived he would frequently suspect. Hence it is that jurors, sitting in judgment, would usually be inclined to repose a higher degree of confidence in ordinary testimony than would justly be due to it in the absence of peculiar guards against deceit; for as the temptations to deceive by false evidence in judicial inquiries are far greater than those which occur in the course of the ordinary transactions of life, they would be apt to place the same reliance on the testimony offered to them, as jurors, to which they would have trusted in ordinary cases, and would consequently, in many instances, overvalue such evidence.

The law therefore wisely requires that the evidence should be of the purest and most satisfactory kind which the circumstances admit of, and that it should be warranted by the most weighty and solemn sanctions. This indeed is but a consequence of one great and important rule of law, viz. that the best evidence shall be adduced; the effect of which is, as will afterwards be seen, to exclude inferior evidence, whenever it is offered in place of that which is of a superior degree and more convincing nature.

Again, for the purposes of saving both time and expense, and to prevent the minds of juries from being distracted from that which is material, it is indispensably necessary to place bounds to collateral evidence, and to exclude such as is of too weak and suspicious a nature to deserve credit, and which, though it possessed no tendency to mislead, would still be mischievous in occasioning delay and expense, and attracting fruitless attention.

In order to exhibit clearly the nature and extent of the excluding tests recognized by the law of England, it is essential first to consider the different classes of evidence to which such tests apply; and then to consider what tests are applicable to each of such classes.

For this purpose all evidence may be divided into two classes: Evidence, direct or indirect.
 1st. *Direct*, which consists in the testimony, whether *immediately* or *mediately* derived from those who had actual knowledge of the principal or disputed fact; or 2dly, *indirect* or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means.

Direct or testimonial evidence, again, is either *immediate*, that is, Immediate or mediate.

Immediate or mediate. where a witness states his own actual knowledge of the fact, or *mediate*, where the information is communicated, not immediately by the party who had actual knowledge of the fact, but from him through the intermediate testimony of one or more other witnesses.

First, then, what are the principles which govern the reception of immediate testimony?

Principles which regulate the admission of immediate testimony.

To render the communication of facts perfect, the witness must be both *able* and *willing* to speak or to write the truth. It is necessary that he should have had, in the first place, the means and opportunity of acquiring a knowledge of the facts; and, in the second, that he should possess the power and inclination to transmit them faithfully; consequently, the first great object of the law is to secure, by proper means, the inclination of the witness to declare the truth, and to ascertain his ability to do so by adequate tests; and it is for the jury afterwards to judge of the credit due to the witnesses, considering their numbers, their opportunities for observing the facts, the attention which they paid, their faculties for recollecting and transmitting them, their motives, their situation with respect to their parties, their demeanour, and their consistency.

Oath.

In order to exclude impure or suspicious testimony, and to add the most solemn and binding sanction to that which is admitted, the law, in the first place, excludes all testimony which is not given under the sanction of an *oath*: and in the next place, subjects the witness to *cross-examination* by the party against whom the evidence is offered.

Tests of truth—disqualification, turpitude.

An immediate consequence of the first test is, that the testimony of a person who by the turpitude of his conduct has made it probable that he would not regard the obligation of an oath, ought not to be received; and therefore it may be taken as a general rule, that no witness is competent to give evidence in a court of justice who has been convicted of any infamous crime. What is to be considered as an *infamous crime*, which will thus wholly render a witness incompetent; 2dly, in what manner the testimony of such a witness is to be objected to; and 3dly, by what means his competency may be restored, will be more properly considered hereafter.

Disqualification, interest.

And, in the next place, the law will not receive the evidence of any person, even under the sanction of an oath, who has an *interest* in giving the proposed evidence, and consequently whose interest conflicts with his duty.

This rule of exclusion, considered in its principle, requires little

explanation; it is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule may, in particular cases, operate to shut out the truth. But the law must prescribe general rules; and experience renders it probable that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion. The principle is sufficiently obvious; its application frequently difficult. The very extensive operation of this principle will afterwards be considered in all its different bearings: it remains at present to sketch the outline of its general and immediate consequences.

Disqualification, interest.

The necessity for defining and limiting the extent of the operation of this principle is an immediate consequence of its adoption, for the sake of certainty in its application, and also to prevent its operating too largely to the exclusion of evidence, which would be productive of great inconvenience. Hence the law defines the kind of interest which shall exclude; it must be a *legal interest* in the event, as contradistinguished from affection, prejudice or bias. Here the law draws the line of distinction, which must be drawn somewhere, and which would exclude too much of the means of discovering the truth, were it to incapacitate every witness who from kindred, friendship, or any other strong motive by which human nature is usually influenced, might be suspected of partiality. Hence, although a man and his wife cannot give evidence for each other (*m*), (for their interests are in law identical), yet no other degree of relationship or connection in society, whether natural or artificial, will incapacitate the parties from giving evidence for each other. A father is a competent witness for his son (*n*), and the son for the father; the guardian and his ward, the master and his servant, may mutually give evidence for each other (*o*).

Disqualification by interest—necessity for defining the rule.

It is no fair ground of objection, that the law excludes a witness who is interested in the event to the smallest pecuniary extent, and yet admits those who, influenced by the strongest ties of natural affection, lie under a much greater temptation to deceive. Is any

This rule reasonable.

(*m*) Nor against each other, as will be seen, on grounds of policy.

(*n*) The application of the principle by the civil law was much more strict, and mutually excluded father and son, patron and client, guardian and ward, from giving evidence for each other; a servant or other

dependent was also incompetent to give evidence for his master, and the testimony of a friend or enemy was regarded with great jealousy. Pand. lib. 22, tit. 5, s. 140.

(*o*) For the application of this rule, see tit. INTEREST.

This rule
reasonable.

exclusive rule necessary? Assuming that the law properly recognizes such a test, and that the exclusion of a witness actually interested in the event is in some cases necessary, the law must exclude all such witnesses, however trifling the amount of that interest may be; for a general rule must be laid down; and as it is impossible to define what extent or degree of interest shall incapacitate a witness, the necessary consequence of recognizing this principle is, to exclude all who are so interested to any extent (*p*). Now what would be the consequence of extending the rule to cases where the witness is influenced by the ties of blood, or of friendship, or by any other of the relations which exist in society? Where is the line to be drawn? If a father cannot be admitted as a witness for his son, must not the same principle exclude the testimony of a brother in favour of a sister; and if so, why not that of an uncle for his nephew, or of one intimate friend for another? and where is the line of exclusion to be drawn? Would it be possible to define the particular degree of influence or bias which would render the witness incompetent? If that were not, as it is, an insuperable difficulty, it would be inconsistent and unreasonable to assign an arbitrary limit not co-extensive with the operation of the principle itself. If, on the other hand, all who labour under influence, prejudice or bias, were to be excluded, the consequence would be that the rule would be too vague and indefinite to be put in practice; of which any one may easily convince himself, who attempts to conceive the extent of its operation, and the infinity of motives and prejudices which arise out of human affairs, gradually diminishing from the most potent by slight shades whose boundaries are imperceptible, and which become at last so faint and weak as to leave the mind in doubt where the operation of the principle terminates. No inconsistency, therefore, in this respect, is attributable to the law, as admitting more suspicious evidence than that which it rejects. The law excludes *all* who have an actual legal interest in the event, however minute that interest may be; because it must exclude all or none; but it does not exclude those who labour under a mere influence, because it cannot lay down any rule short of excluding all who are influenced or prejudiced; and this rule is impracticable from its ambiguity and extent. The difficulty arises from the general and extensive nature of human motives and prejudices, which exclude any definite limitation; and it is no fair ground of objection to the law, that it lays down one

Exclusion
by interest

(*p*) See, however, the observations of Best, L. C. J. in *Hovill v. Stephenson*, 5 Bing. 497: and *infra*, tit. INTEREST.

rule which is essential to the pure administration of justice, and is capable of practical application, and does not lay down another which would be impracticable and mischievous.

Exclusion
by interest.

There is another strong reason of a practical nature for making this distinction: where the legal interest in the event is small, although it must, as long as it exists, exclude the testimony, yet it may in most instances be removed by means of a release, or by payment; but partiality or influence, arising from natural affection or friendship, admits of no release.

Reason-
ableness of
this dis-
tinction.

What constitutes a legal interest in the event of a cause, will be hereafter fully considered (*q*); it may, however, be stated generally, that it must either be a *direct and certain* interest in the event of the cause, or an interest in *the record* for the purposes of evidence. The law considers it to be more safe to admit the evidence where there is a doubt, than to exclude it altogether; for on the one hand, the rejection is peremptory and absolute; on the other, if the witness be received, it is still for the jury to consider what credit is due to his testimony, taking into consideration all the circumstances of the case, and the motives by which he may be influenced. Hence it is the inclination of the courts, that objections of this nature should go to the *credit* of the witness rather than to his *competency*; and they will not wholly exclude a witness from giving evidence, unless he would be immediately and directly affected by a result contrary to the tendency of his testimony, or unless he has an immediate interest in the record. It is of the highest importance that a fundamental rule of this nature, which is so extensive in its operation, should be simple, and easy to be applied in practice; a very sufficient reason for confining it to cases where the interest is certain and immediate, and not permitting it to operate where it is contingent, remote and dubious: the uncertainty of such a rule would be productive of infinite contention; the evil would be certain, the advantage doubtful. The law, therefore, never excludes testimony unless the interest of the witness be direct and certain. It must, however, be recollected that in all cases, even where the witness is strictly competent, the degree of credit which he deserves is always a question for the peculiar consideration of the jury, who are to form their judgment as to his veracity, from his demeanour, his situation, and all the surrounding circumstances.

Nature of
the interest

Two classes of cases are here to be noticed where a witness is competent, notwithstanding his interest. 1st. Where the witness has previously, and with a view to deprive a party of the benefit of his testimony, or even wilfully and wantonly, acquired an in-

Exceptions.

(*q*) See tit. WITNESS—INTEREST.

Exceptions. terest in the event ; for this is to be considered as a species of fraud upon the individual or the public, who had an interest in his testimony. 2dly. There is a class of cases where the law admits the testimony of an interested witness, on the ground of the *necessity* of the case, and where, in the common course of human affairs, if the witness were to be considered as incompetent, a failure of justice would result from defect of testimony. These exceptions, however, are rare, and confined principally to the cases of a servant who transacts his master's business, and who in the usual course of affairs is the only person who can give evidence for his master ; of a wife on a charge against the husband of having committed violence to her person ; and of one who brings an action against the hundred under the statute to recover the value of the property of which he has been robbed ; for here, from the very nature of the case, it is highly improbable that he should be able to adduce any witness to prove the robbery. It is not sufficient that the inability to procure evidence should result from the circumstances of a particular case, for that would amount to little short of the destruction of the general rule ; the necessity must arise from a general presumption arising from the nature of the case, that in the common course of human affairs there will be a defect of evidence and a failure of justice, unless such evidence be admitted. Since the benefit of such testimony is purchased at the price of a departure from a most beneficial and fundamental rule, it is not probable that the courts would be willing to extend this class of exceptions.

Operation
of this ex-
cluding
principle.

The operation of this excluding principle is not confined to the mere rejection of interested witnesses, but also excludes all written evidence which proceeds from an interested source. Hence the deposition of one who, being interested, could not have been examined as a witness, cannot be read ; and this seems to be one principal reason for rejecting, in a civil action, a record in a criminal proceeding, as proof of the fact found by the verdict in the criminal proceeding : for the verdict on the trial of the indictment may have been procured by the evidence of the party who seeks to avail himself of it in the action, and therefore to admit such evidence would virtually be to allow the party to give evidence in his own cause. So that if *A.* indict and convict *B.* of an assault, and afterwards bring an action against him to recover damages for the same injury, the record of the conviction would not be admissible to prove the assault, since that conviction may have resulted entirely from the credit given to *A.*'s testimony (*r*).

(*r*) See tit. JUDGMENT, &c. and Gilb. L. E. 31.

The first great safeguard which the law provides for the ascertainment of the truth in *ordinary* cases, consists in requiring all evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment.

Obligation
of an oath.

A judicial oath may be defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth, as far as he knows it(s).

Hence it follows that all persons may be *sworn* as witnesses who believe in the existence of God, in a future state of rewards and punishments, and in the obligation of an oath, that is, who believe that Divine punishment will be the consequence of perjury; and therefore Jews(*t*), Mahometans(*u*), Gentoos(*v*), or in short, persons of any sect possessed of such belief, are so far competent witnesses(*w*). Hence also it follows, that children who are too young to comprehend the nature of an oath(*x*), and adults, who, from mental infirmity or for want of instruction, do not understand this solemn obligation, or who do not believe in the existence of a Deity, or in a state where that Deity will punish perjury(*y*), cannot be admitted as witnesses; since in all these cases, either from want of understanding, or want of belief, that obligation to speak the truth is wanting which the law has appointed on such occasions as an indispensable security.

What belief
is neces-
sary.

As the object of the oath is to bind the conscience of the witness, it follows that some form of swearing must be used which the

Form of an
oath.

(*s*) Est autem Jusjurandum religiosa adseveratio per invocationem Dei tanquam vindictis, si juratus sciens fefellerit. Heinzeccius, pars 3, s. 13.

(*t*) It was held that Jews might be sworn on the Pentateuch, previous to their expulsion from England; i. e. before the 18 Ed. 1, when they were first expelled from the kingdom. *Wells v. Williams*, 1 Lord Raym. 282; Vernon, 263; Cowp. 389. See Seld. tom. 2 fol. 1467, as to the form of swearing a Jew, temp. Ed. 1.

(*u*) *Fachina v. Sabine*, Str. 1104. *Morgan's Case*, Leach, 52; 2 Hawkins, c. 46, s. 152. *Omichund v. Barker*, 1 Atk. 21; 1 Wils. 84. *Rex v. Taylor*, Peake, 11.

(*v*) *Ramkissensent v. Barker*, 1 Atk. 19.

(*w*) According to some, swearing on the

New or Old Testament was held to be essential; 2 Haw. c. 46, s. 148; but this idea has been exploded. See Atk. 21; 2 Hale, 279; Cowp. 390.

(*x*) Vide *supra*; and see East's P. C. 441; and *R. v. Powell*, Leach's C. C. L. 128. 237.

(*y*) An Atheist is not competent. B. N. P. 262. *Rex v. White*, Leach's C. C. L. 483. *Lee v. Lee*, 1 Atk. 43. 45. Co. Litt. 6. 2 Inst. 479; 3 Inst. 165; 4 Inst. 279; Fleta, b. 5, c. 22; Bract. 116. See *Rex v. Taylor*, Peake, Ca. Ni. Pri. 11, where Buller, J. held that the proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, and in a future state of rewards and punishments.

Form of an oath. witness considers to be binding (*z*); and therefore every witness is now (*a*) sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs. A Jew is sworn upon the Pentateuch (*b*), and a Turk upon the Koran (*c*); so it has been held that a Scotch covenanter (*d*) may be sworn according to the form of his sect, by holding up his hand without kissing the book (*e*).

Oath must be judicial. The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course of a regular proceeding, administered by an authorized person; for if the oath were extrajudicial, the witness could not be punished for committing perjury under that oath; and therefore one of the securities for truth which the law has provided would be wanting. Hence, although every other legal requisite may concur to render what a party has sworn admissible, and although the fullest opportunity has been afforded to the opposite party to cross-examine the witness, yet if the oath was extrajudicial, the testimony given under it is not admissible. A further objection to such evidence is, that the party against whom it was offered was not bound to notice it, and he ought not to be placed in a worse situation by omitting to make himself a party to an extrajudicial and illegal proceeding. This doctrine, and the minor distinctions arising upon it, will be more fully discussed hereafter, when the different cases relating to the reception of judicial proceedings in evidence are considered; for the present, it may suffice to observe, that it is a general rule that testimony given under an oath merely extrajudicial, cannot afterwards be admitted in evidence, for the reasons already stated.

Declaration by party in extremis. There are two exceptions to the general rule: the case of declarations made by a person under the apprehension of impending dissolution, and the exception introduced by the express provisions

(*z*) On the principles of common law no particular form is essential to the oath. Cowp. 389. *Dutton v. Cole*, 2 Sid. 6.

(*a*) It was formerly doubted whether the oath must not be taken on the Old or New Testament; 2 Hale, 279; but it is now settled that it need not. 1 Atk. 21; 2 Eq. Ab. 307; 1 Wils. 84; Cowp. 390.

(*b*) Cowp. 389; 1 Lord Raym. 282.

(*c*) *Fachina v. Sabine*, Str. 1104. *Morgan's Case*, Leach, C. C. L. 64.

(*d*) Per Lord Mansfield, Cowp. 390. *Rex v. Mildronc*, Leach, C. C. L. 459. *Mec v. Read*, Peake's Ca. Ni. Pri. 23.

Rex v. Fitzpatrick, Leach, 459; 2 Sid. 6. *Dutton v. Cole*. When Lord Hardwicke was desired to appoint a form for swearing the Gentoos, he said that it was improper, and that it must be taken according to the form which they held to be most solemn. *Ramkissensent v. Barker*, 1 Atk. 19.

(*e*) The form of the oath taken by those who matriculate in the University of Cambridge differs from the common form; the words, instead of "So help you God," being "Sic te adjuvet Deus et sancta Dei Evangelia."

of the Legislature in favour of the religious scruples of Quakers and some others. The principle upon which the first of these exceptions stands is very clear and obvious; it is presumed that a person who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all that he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath. The exception in favour of Quakers, formerly confined to civil, has lately been extended to criminal proceedings, and similar provisions have been made in favour of some other religious sects (*f*). The rank or age of the party in no case forms an exception. A peer of the realm cannot give evidence without being sworn (*g*), and will incur a contempt of court if he refuses to be sworn (*h*). It is now settled that the testimony of a child cannot be received except upon oath (*i*), although the contrary practice once prevailed (*j*).

Declaration
by a party
in extremis.

Affirmation
by a
Quaker.

Formerly, the general rule did not extend to the witnesses examined on behalf of prisoners charged upon an indictment (*k*) with felony or treason (*l*); an exception which certainly was not founded in principle, and which was reprobated by Lord Coke (*m*). The statute 4 Jac. 1, c. 1, directed, that upon the trial of offenders in the three northern counties, for offences committed in Scotland, the defendants' witnesses should be examined upon oath; and a like provision was made by the stat. 7 Will. 3, c. 3, in all cases of treason which worked corruption of blood. The exception was

Witnesses
for prison-
ers are now
to be
sworn.

(*f*) 9 G. 4, c. 15. The stat. 7 & 8 W. 4, c. 34, made a Quaker's affirmation admissible in civil cases. By the stat. 9 G. 4, c. 32, Quakers and Moravians are admitted to give evidence upon their solemn affirmation in all cases, criminal as well as civil. By the stat. 3 & 4 W. 4, c. 49, their affirmation has the same force and effect as an oath in the usual form. By the stat. 3 & 4 W. 4, c. 82, similar provisions are extended to Separatists.

(*g*) *Rex v. Lord Preston*, Salk. 278.

(*h*) *Ibid*. And it has been said that the same rule applies to the Sovereign himself; 2 Rol. Abr. 686; Hob. 213; but in the time of Ch. 1, the question was not allowed to be agitated. 1 Parl. Hist. 43. See 3 Woodeson, 276, Com. Dig. Testmolgne, A. 1.

(*i*) *Rex v. Brasier*, Leach, C. C. L. 3d ed. 237; 1b. 128. And see the cases, *East's* P. C. 441; and post. tit. INFANT. But in

some cases, where a child, from ignorance of the obligation of an oath, cannot be sworn, the Court will put off the trial, to afford an opportunity of instructing the child.

(*j*) The Court should hear the information of children not of discretion to be sworn, without oath. 1 Hale, H. P. C. 634; 2 Hale, H. P. C. 279. 284. But Lord Hyle adds, that such testimony is not sufficient of itself. 1 Hale, H. P. C. 634.

(*k*) But the evidence for a defendant upon an appeal, or on an indictment or information for a misdemeanor, was always on oath. 1 Sid. 211. 325.

(*l*) 2 Hale, 283; 2 Bulstr. 147. *Rex v. Throgmorton*, State Tr. 1 M.; Haw. c. 36. *Rex v. College*, 3 Inst. 79; 4 State Tr. 178; Cro. Car. 292.

(*m*) 3 Inst. 79. The practice was derived from the civil law. 4 Bl. Com. 352.

Witnesses
for prison-
ers are now
to be sworn.

finally and generally abolished by the stat. 1 Ann. c. 9, s. 3, which directed that the witnesses for the prisoner should be sworn in *all cases*.

It will presently be seen under what circumstances evidence is admissible, though it want the sanction of an oath.

Test of
cross-exa-
mination.

And next, the power given to the party against whom evidence is offered, of *cross-examining* the witness upon whose authority the evidence depends, constitutes a strong test both of the ability and of the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized.

It is not intended in this place to enter into a detail of the numerous consequences which follow from the adoption of this test (*n*). It may be observed, generally, that it operates to the exclusion of all that is usually described as *res inter alios acta*; that is, to all declarations and acts of others which tend to conclude or affect the rights of a mere stranger.

Thus the depositions of witnesses before magistrates, under the statutes of Phil. & Mary, and the late stat. 7 Geo. 4, c. 64, are not admissible against the accused, unless he has had an opportunity to cross-examine those witnesses.

The voluntary affidavit of a stranger is not evidence against one who had not the power to cross-examine him (*o*). An answer in chancery is not evidence against one who neither was a party to the suit, nor claims in privity with a party who had the opportunity (*p*). And, in general, the mere act, declaration or entry of a stranger, as to any particular fact, is not evidence against any other person (*q*), so as to conclude or affect him.

To satisfy this principle, it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used, in order that he may then be cross-examined; it is sufficient if the party against whom it is offered has cross-examined, or has had the opportunity, having been legally called upon to do so when the statement was made. Hence it is that examinations or depositions taken in a cause or proceeding between the same parties are evidence, the witnesses or de-

(*n*) See tit. JUDGMENTS—DEPOSITIONS.

(*o*) Bac. Ab. Ev. 627; Sty. 446; Bac. Ab. Ev. 628. And see *Ree v. Erith*, 8

East, 539. *Sir John Fenwick's Case*, Obj. 4. 5 State Tr. 69.

(*p*) Hardres, 315.

(*q*) See Index, tit. RES INTER ALIOS.

ponents being dead ; for in such case the party has had, or might have had, the benefit of a cross-examination. With respect to these classes of cases, it is worthy of notice, that if the party might have had the benefit of a cross-examination in the course of a judicial proceeding, it is the same thing as if he had actually availed himself of the opportunity. It is also to be observed, that if the examination or deposition was taken in the course of an extrajudicial proceeding, it will not afterwards be admissible in evidence, although the witness be since dead ; because the party against whom the evidence is offered was under no obligation to pay any attention to it (r).

Test of
cross-ex-
amination.

This test of truth not only excludes evidence of mere hearsay, for there the party on whose authority the statement rests cannot be cross-examined ; but also decrees and judgments in private matters, in causes to which the party against whom they are offered was not privy, and consequently where he had not the opportunity to cross-examine the witnesses on whose testimony the judgment or decree was founded. For as it would be dangerous to admit the testimony of a witness given upon a former occasion, where the party to the present cause had no opportunity to cross-examine him, it would be equally so to admit the judgment or decree which is founded upon that testimony ; it would be indirectly giving full effect to evidence which is in itself inadmissible.

Excludes
hearsay
evidence.

It is, however, to be observed that there is one class of cases where decrees or judgments are evidence against a party, although he was not actually privy to the proceeding or suit in which the judgment or decree was pronounced. This happens where the suit or proceeding does not relate to a mere private transaction between individuals or particular parties, but to some more public subject-matter beyond the mere rights of the litigants, in which the public possess an interest. It will be necessary hereafter to consider these cases with some minuteness ; for the present, it may suffice to advert to them generally, and briefly to state the principle on which such evidence is admissible ; and how far it is inconsistent with the general and ordinary rule, that a party is not to be affected either by any testimony or judgment founded upon that testimony, where he has not had an opportunity to cross-examine the witness and to controvert his testimony. In many instances a court possesses a jurisdiction which enables it to pronounce on the nature and qualities of particular subject-matter, where the proceeding is, as it is technically termed, *in rem* : as where the Ordi-

(r) See tit. RES INTER ALIOS—JUDICIAL PROCEEDINGS, &c.

Excludes
hearsay
evidence.

nary or the Court Christian decides upon questions of marriage or bastardy ; or the Court of Exchequer upon condemnations ; or the Court of Admiralty upon questions of prize ; or a court of quarter sessions upon settlement cases. Decisions of this nature, as will be seen (s), are for the most part binding and conclusive upon all the world. At present it is to be observed, in the first place, that this class of cases is scarcely to be considered as an exception to the general rule ; because, in most instances, every one who can possibly be affected by the decision may, if he chuse, be admitted to assert his rights to cross-examine and to controvert by evidence. But, secondly, if this class of cases is to be considered as forming an exception to the general rule, it is a necessary exception, since in such cases a final adjudication is absolutely essential to the interests of society, which require that the subject-matter should be settled and ascertained, and cannot bear that such questions should be left in a precarious, doubtful and fluctuating state. For example : the Spiritual Court has an immediate and direct jurisdiction upon the validity of marriages ; a jurisdiction which involves questions of the greatest importance to society in general—rights of property—questions of bastardy—and even criminal liabilities. It is therefore obviously essential to the existence of such a jurisdiction for useful and beneficial purposes, that its adjudication upon the subject-matter should be binding upon all ; it would be in vain that a sentence of nullity of marriage should be pronounced in a spiritual court, if the marriage could still be considered in courts of law to exist as to all the legal rights and consequences of a valid marriage ; and it would produce infinite inconvenience and confusion, if the same marriage could be considered as existing for some purposes, but not as to all ; not to mention the great evil of permitting interminable litigation on the same question, which would be left open to dispute as often as the fluctuation of times and of circumstances introduced new interests, and brought fresh litigants into the field.

Exception.
Dying de-
claration.

There is another exception to the general rule, in the case where a declaration made by a person *in extremis*, and under the apprehension of approaching dissolution, is received in evidence ; for such declarations are admitted to be proved, although the party against whom they are offered was not present, and therefore had not an opportunity to cross-examine and elicit the whole of the truth. But as this is an exception to a rule which is in general to be considered as absolutely essential to the ascertainment of truth,

it is to be received with the greatest caution, and is never admitted unless the Court be first satisfied that the party who made the declaration was under the impression of approaching death. It has indeed been said, that the depositions of witnesses taken *in the absence of the prisoner* before justices of the peace, and before coroners, by virtue of the statutes 1 & 2 Philip & Mary, c. 10, and 2 & 3 Philip & Mary, c. 13, were admissible in evidence against the prisoner after the death of the deponent; but it seems now to be settled that such depositions before justices are not admissible, unless the prisoner was present, and had the benefit of cross-examination (*t*); and depositions taken by coroners, under the same statutes, seem to stand upon the same foundation. This subject will afterwards be more fully considered in its proper place; it must be recollected that at present the object is to consider the general operation of this principal test of truth established by the law. How far reputation and tradition are to be looked upon as exceptions to this general rule will afterwards be considered (*u*).

Exception.
Dying de-
claration.

Thus far as to the immediate testimony of witnesses as to facts, within their own actual knowledge, under the obligation of an oath, and subject to cross-examination.

Next, as to the admissibility of evidence derived not immediately from those who have, or are supposed to have actual knowledge of the fact, but mediately through the testimony of one or more other witnesses (*w*).

Mediate
testimony.

Such mediate testimony is in some particular cases to be regarded as *original* evidence; but in general it is of so inferior and *secondary* a nature as to be admissible only in cases of urgency, on the failure of better evidence, and under the sanction of particular circumstances, which warrant its admissibility.

Original or
secondary.

In the first place, such evidence is in some instances admissible originally, and without any proof of the failure of better evidence. Thus general reputation is in many instances receivable, although it may rest on no other foundation than what the witness may have heard from others (*x*).

General reputation is the general result or conclusion formed by

General
reputation.

(*t*) See tit. DEPOSITIONS.

(*u*) There are also some exceptions which have been introduced by, and which wholly depend upon, particular statutes; but as these are mere arbitrary exceptions, unconnected with general principles, they need not be noticed here.

(*w*) Or by the writing of the original witness, for both must depend on the same

principle; the only difference is that writing is the surer medium.

(*x*) Reputation is sufficient evidence of marriage, although the parties are still alive, and the party seeks to recover as heir-at-law. *Dier v. Fleming*, 4 Bing. 1266. See tit. CUSTOM—MARRIAGE—PEDIGREE—PRESCRIPTION.

General
reputation.

society as to any public fact or usage, by the aid of the united knowledge and experience of its individual members: such a general concurrence and coincidence of opinion on facts known to many, affords a reasonable degree of presumption that their conclusion is correct (y); and therefore in particular cases, where the fact is of a public nature, general reputation is admissible evidence to prove it. But as it could not be necessary, and otherwise would not be practicable, to examine the whole body of society as to the prevalence of general reputation on any particular fact, it is sufficient to call individual witnesses, a portion of society, who can, under the sanction of an oath, and subject to cross-examination, pledge their personal knowledge that such reputation exists.

It is observable that, in one respect, such evidence can scarcely be considered as forming an exception to the general rule which requires the sanction of an oath and the opportunity to cross-examine; for the witnesses are called to prove what they actually know, viz. that such a reputation exists: they are sworn and subject to cross-examination, and the very nature of such evidence excludes any more solemn sanction.

The particular subjects to which such evidence is applicable requires further consideration.

It is to be observed that many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are in ordinary cases imperceptible by the senses, and therefore incapable of the usual means of proof. Among these are questions of pedigree or relationship, character, prescription, custom, boundary, and the like. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases affords. Now the knowledge of facts of this description consists either in the knowledge and recollection of that part of society which has had the means of observing them, or in the traditionary declarations of those who were likely to have possessed a knowledge on the subject, derived either from their

(y) In the case of *Du Bost v. Beresford*, 2 Camp. 512, the defendant, justifying the destruction of a picture which the plaintiff had exhibited to the public for money, as being meant to libel his sister and her husband, it was held, that declarations by spectators were admissible to show that the figures were meant to represent the particular persons. This was in effect to admit

the coincident opinions of numbers as evidence of the resemblance. Reputed ownership is (per Gibbs, C. J. in *Grove v. Rutten*, Holt's C. 327), made up of the opinion of a man's neighbours; it is a number of voices concurring in one or other of two facts. See *Oliver v. Bartlett*, 1 Br. & B. 269; and Vol. II. tit. BANKRUPT.

own observation, or the information of others; or, lastly, in questions of skill and judgment, the knowledge of the relation must be derived from those who are possessed of the proper qualifications for forming a conclusion on the subject. The character of a particular individual in society is formed by society from their experience and observation of the conduct of the individual; and here reputation is not so much a circumstance from which the character of the individual is to be presumed, as the very fact itself, proved by the direct evidence of witnesses who constitute part of that society. The knowledge of the existence of a particular public custom does not reside peculiarly in the breast of any one individual whatsoever, but in the opinion and conclusions which society, or some indefinite part of it, have collected from actual observation and experience.

General
reputation.

In cases of *pedigree*, the nearest relation, even that of parent and child, can seldom be proved, after the death of the parents, by direct evidence; and no knowledge upon the subject exists except that which is inferred from circumstances, or derived from the hearsay testimony of those who, from their intimacy with the family, possessed peculiar means of knowledge. The circumstance that the parents cohabited as husband and wife, acknowledged and addressed each other in society as such; that they recognized and educated children as their own, and introduced them to the world on a variety of occasions as their legitimate offspring; that a pedigree was hung up in the family mansion, stating the different degrees of relationship of the members of the family; that similar entries were made in a family bible; that a monument or tombstone was exhibited to the public, announcing a relation between the deceased and the surviving, or deceased and late, members of a family; all such circumstances are either strictly facts, or are solemn and deliberate declarations accompanying facts, and partaking of the nature of facts, which, in the absence of all suspicion of fraud, afford the strongest presumptions that the parties really did stand in the relative situation of husband and wife, parents and children, or other degree of kindred; for it is improbable that such circumstances should have been acted with a view to deceive, particularly in a manner so open and public as to render the fraud liable to immediate detection. From such circumstances the belief is formed, by those who are acquainted with the family, and a *reputation* obtains in society that they are so related; for reputation seems to be no more than hearsay, derived from those who had the means of knowing the fact. Hence it is that the reputation may exist when those who were best acquainted with the fact are dead; and that such

Reputation
in case of
pedigree.

Reputation
in case of
pedigree.

reputation and even traditionary declarations become the best, if not the only, means of proof; and when they are derived from those who were most likely to know the truth, and who lay under no bias or influence to misrepresent the fact, they afford a fair, and reasonable presumption of the truth of the fact.

Ancient
facts.

Again: upon questions of fact, to which antiquity is essential, as of prescription, custom and boundary, (and also of pedigree, where the relationship is to be traced through a remote ancestor,) the evidence of living witnesses is of little avail, except as to the observance of the right, privilege or obligation, in modern times; for any knowledge concerning such rights, drawn from times more remote, recourse must be had to reputation and tradition; such evidence being supported by proof of the enjoyment of such rights and privileges, and of acquiescence in them in more recent times.

Presump-
tions, why
founded on
reputation.

On these grounds, therefore, general reputation is admissible evidence, as affording presumptions upon which juries are to exercise their discretion in cases of this nature. Such instances have, it seems, been regarded as anomalous, and as forming exceptions to the general rule which has already been noticed, viz. that mere naked declarations are too vague, uncertain and fallacious, to afford sufficient presumptions for the consideration of a jury (z). Such evidence is at all events warranted by the necessity of the case. The particular objection which excludes mere hearsay in general does not apply to those cases which are of a public nature, which may be presumed to be matters of public notoriety, as in the instances of public prescriptions, customs and character, and where reliance is placed not on the credit due to the assertion of a single individual, but is sanctioned by the concurrent opinion and assent of indefinite numbers; in such cases a presumption exists that the truth of the fact is known and faithfully communicated.

Reputation,
in what
cases evi-
dence.

Hence, therefore, common reputation is evidence to prove, 1st,

(z) Per Lord Ellenborough, C. J. The admission of hearsay evidence upon all occasions, whether in matters of *public* or *private right*, is somewhat of an anomaly, and forms an exception to the general rules of evidence. And his Lordship afterwards observed, "I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said,

indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights; but I must confess that I have not been able to see the force of the principle on which this distinction is founded, so clearly as others have done, though I must admit its existence." *Weeks v. Sparke*, 1 M. & S. 686.

a man's character in society (*a*); 2dly, reputation and (as will afterwards be seen) traditionary declarations are evidence to prove a pedigree, including the state of a family as far as regards the relationship of its different members, their births, marriages and deaths; 3dly, reputation and traditionary declarations are evidence to prove certain prescriptive or customary rights and obligations, and matters of public notoriety. But inasmuch as the reception of such evidence is founded upon the supposition that the persons from whom it is derived possessed the means of knowledge; and since such evidence is in its own nature very weak, unless it be supported by other circumstances (*b*), the following sanctions appear to be necessary to warrant a presumption from such evidence.

Reputation, in what cases evidence.

First, In order to warrant such a presumption, the fact to which the reputation or tradition applies, must in general be of a *public* nature; for otherwise it cannot be presumed that the persons from whom the knowledge is derived possessed the means of knowledge, or if they did possess the means, that their attention and observation were attracted to it; and therefore such evidence is admissible in cases of character, public prescriptions, and customs relating to manors (*c*), parishes, and of rights of common, and public boundaries and highways (*d*). Such evidence is also received with respect to the existence of a *modus* (*e*), because, although it is in strictness a private right, yet it affects a great number of occupiers within a district (*f*).

1. The facts must be of a public nature.

So where the defendant in trespass pleaded a prescriptive right of common over the *locus in quo*, at all times, for his cattle levant and couchant, and the plaintiff, in his replication, prescribed in right of his messuage to use the *locus in quo* for tillage with corn, and until the taking in of the corn to hold and enjoy the same in

(*a*) See tit. CHARACTER. It is not probable that a man of good conduct, and therefore, as may be inferred, of good principles, would commit a crime. But the opinion which a particular person may have formed and expressed as to the honesty of another, is not admissible, it is only his own single judgment; but if indefinite numbers coincide in forming and expressing the same opinion of the honesty of any person, that general coincidence of opinion on a subject which they were likely to know and discuss, gives to it such weight and importance, that the law admits it as a medium of proof.

(*b*) 1 M. & S. 687. Reputation is, in general, weak evidence; and when it is admitted, it is the duty of the Judge to impress upon the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have. Per Lord Ellenborough, 1 M. & S. 686.

(*c*) *Barnes v. Newsom*, 1 M. & S. 77.

(*d*) 1 M. & S. 686. See tit. CUSTOM—PRESCRIPTION, &c.

(*e*) 2 Vez. 512. Gwill. 854.

(*f*) Per Dampier, J. 1 M. & S. 691; see tit. TITHES.

Of a public
nature.

every year, and traversed the defendant's prescription, on which issue was joined, it was held (g) that many persons besides the defendant having a right of common over the *locus in quo*, evidence of reputation, as to the right claimed by the plaintiff, was admissible, a foundation having been first laid, by evidence of the enjoyment of such right. But it seems to be now settled, although the question was long *sub judice*, that general evidence of reputation is not admissible in the case of a private prescription or other claim. In the case of *Morewood v. Wood* (h), the question was, whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, was admissible; and the Judges were divided upon it (i). In *Outram v. Morewood* (k), Lord Kenyon said, "that although a general right might be proved by traditionary evidence, a particular fact could not." There the question was, whether Cow Close had been part of the estate of Sir J. Zouch, out of which certain rents and coals had been reserved; and the Court held that the fact could not be proved by entries made by a third person deceased, in his books of receipts of rents from his tenant, such entries being considered as no more than a declaration of the fact by such third person; which was different from entries by a steward, who thereby charged himself with the receipt of money. In *Doe v. Thomas* (l), where in an action of ejectment the lessor of the plaintiff claimed as tenant in tail under the will of A. who gave B. his son an estate for life, and the defendant claimed as the devisee of B., the question was, whether the land in dispute was part of the entailed estate, or had been purchased by B.; it was held that evidence of reputation that the land had been purchased of J. S. by A. was inadmissible (m). And although traditionary reputation is evidence of boundary between two parishes and manors (n), it is not evi-

(g) *Weeks v. Sparke*, 1 M. & S. 691.

(h) 32 G. 3, B. R. 15 East, 327, in note.

(i) Lord Kenyon, and Ashurst, J., who were for rejecting the evidence, were of the Oxford circuit, on which such evidence had usually been rejected; and Buller and Grose, Js., deemed it admissible, in conformity with the practice of their own, the western circuit. Report is not evidence to prove private rights. Per Lord Kenyon, 2 East, 357. Report is evidence to prove reputed ownership of goods, if supported by facts. *Oliver v. Bartlett*, 1 B. & B. 269.

(k) 5 T. R. 123.

(l) 14 East, 323.

(m) In the *Bishop of Meath v. Lord Belfield*, B. N. P. 295, it was held that evidence of reputation was admissible, in *quare impedit*, to prove that one Knight had been in by the presentation of one from whom the defendant claimed. But in *R. v. Erinswell*, 3 T. R. 723, Lord Kenyon denied that this case was law.

(n) *Nicholls v. Parker*, Ex. Summer Ass. 1805, cor. Le Blanc, J., Taunt. 1795; *R. v. Parish of Hammersmith*, Sitt. after Hil. 1776; *Down v. Hale*, cor. Lawrence, see 14 East, 331. Peake's Ev. App. 33; *Ireland v. Powell*, Salop S. Ass. Peake's Ev. App. 33.

dence of boundary between two private estates (o). Upon the principle that it is a matter of general and public notoriety, a particular historical fact may, as it seems, be proved by reputation of the fact, and (as falling within the scope of such evidence) by a generally received historical account of it (p).

Of a public nature.

2dly. Neither reputation nor traditional declarations are admissible as to a particular fact (q). Evidence of reputation upon general points is receivable, because all mankind being interested in them, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them (r), all having the same means of information; but this does not apply to particular facts, which may not be notorious, which may be misrepresented or misunderstood, and which may have been connected with other facts by which their effect would be limited and explained. Such evidence would obviously be open to all the uncertainty, and liable to all the objections, incident to mere hearsay evidence, and is therefore of too slight a nature to support any presumption. And therefore, upon a question of modus, evidence of the declaration of an old person, since deceased, that so much per acre had always been paid in lieu of tithes, would be good evidence as to reputation; but a declaration by such a person that he paid so much in lieu of tithes would not be admissible, since it is a particular fact (s). So in those cases where evidence of perambulations is admitted, it is in the nature of hearsay evidence, not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot; but it is evidence of the ambit of any particular place or parish, and of what the persons accompanying the survey have been heard to say and do on such occasions (t).

2. Must be general.

3dly. If the reputation or tradition relate to the exercise of a right or privilege, it should be supported by proof of acts of enjoyment of such right or privilege within the period of living memory (u); and when that foundation has been laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoy-

3. Must be supported by proof of acts of enjoyment.

(o) *Clothier v. Chapman*, 14 East, 331, in the note.

(p) B. N. P. 248; 1 Salk. 282; 1 Vent. 151; Skinn. 14. 623.

(q) Per Lord Kenyon, *Outram v. Morewood*, 5 T. R. 123.

(r) Per Lord Kenyon; see *Morewood v. Wood*, 14 East, 339.

(s) *Harwood v. Sims*, 1 Wightw. 112.

(t) Per Lord Ellenborough, 1 M. & S. 687. In the case of *Jones v. Perry*, 2 Esp.

C. 482, Lord Kenyon, in an action for keeping a malicious dog, which had bit the plaintiff's child, is reported to have admitted evidence of a report in the neighbourhood that the dog had been bitten by another dog. This case, however, seems to go beyond the general principle, as it is reputation of a particular fact only.

(u) See the observations of the Judges in *Weeks v. Sparke*, 1 M. & S. 679, and of Grise, J., 5 T. R. 32.

ment beyond the time of living memory, evidence is to be admitted from old persons conversant with the neighbourhood where the right is claimed, of what they have heard other old persons, who were in a situation to know what the rights were, say concerning them(*w*).

Direct
mediate.

Another class which falls within the description of direct mediate evidence, and which is admissible, though the usual tests are inapplicable, consists of declarations made by one of the parties to a suit, in the nature of a confession or admission contrary to his own interest. Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth. The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to have been made by himself(*x*). As to such evidence the ordinary tests of truth are properly dispensed with; they are inapplicable: an oath is administered to a witness in order to impose an additional obligation on his conscience, and so to add weight to his testimony; and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief.

Declaration
accom-
panying an
act.

There is also another species of hearsay evidence which in some instances may be referred to this class. Where a declaration accompanies an act, it is frequently admissible as part of the act itself. Such declarations, it will be seen, are more frequently used as collateral or indirect evidence from which some other fact is to be inferred, than as direct evidence of a fact; and as such will be afterwards considered. Suffice it to observe, for the present, that declarations are usually admissible where the fact which they accompany is material and admissible, and where the nature and quality of the act are also material; for in such instances a declaration accompanying the act may either be regarded as part of the act itself, or as the most proximate and satisfactory evidence for explaining and illustrating the fact.

Experience supplies a reasonable presumption that a declaration made by a person in doing an act, as to his intention and object, and where that person laboured under no temptation to deceive, was spontaneous, natural, and consistent with truth. The most usual example(*y*) adduced in illustration of this doctrine, is that

(*w*) 1 M. & S. 679; 14 East, 390; 12 East, 65.

(*y*) See below, tit. WITNESS; Vol. II. tit. BANKRUPT.

(*x*) See Vol. II. tit. ADMISSIONS.

of a declaration made by a trader, at the time of deserting his house or place of business, as to his intention and object in so doing, in order to prove an act of bankruptcy. Here it is observable that the fact of departure is material: the question is as to the nature and quality of the act, that is, as to the object and intention of the trader in doing that act; and to prove this, the declarations which he made at the time of leaving his house or counting-house, are constantly admitted in proof of his design, as being natural and spontaneous indications of the truth, although his subsequent declarations, even upon oath, would be absolutely rejected.

It is emphatically to be observed, that the rule admitting evidence of a declaration accompanying an act, is not founded on any general presumption that in every such case credit is to be given to the veracity of the declarant; for if that were so, and acted on as a general rule, the acts of strangers would be admissible for the purpose of sanctioning the admission of such declarations. But, as will be seen, the acts of strangers are excluded, for reasons as strong, if not stronger, than those which exclude the mere declarations of strangers; and as the transactions of mere strangers, not in themselves material to the subject of inquiry, are properly regarded as inadmissible, so likewise must declarations be excluded which depend for their credit on their connection with the acts of strangers.

Whether, therefore, declarations accompanying acts are to be deemed of value from credit given to the declarant, or as being part and parcel of the collateral circumstances from which the jury are to draw their conclusion as to the nature and quality of the act itself, it is essential that the act itself should be material and admissible. If, for the sake of illustration, the question for what purpose a sum of money was paid by *A.* to *B.*, were material to the issue, what *A.* said to *B.* on paying the money would be most important, it may be, conclusive evidence. But if *A.* and *B.* were strangers to the cause, and the fact of payment were not material to the issue, then, although *A.* at the time of payment made a declaration as to the truth of a fact material to the issue, as that he had lost a wager betted on that fact, the declaration would neither be evidence in itself nor as explanatory of the act of *A.*, which, as being the act of a stranger, was also inadmissible (z).

These classes of mediate evidence are distinguishable from all

(z) The principle of admitting declarations as accompanying acts was much considered in the case of *Doe d. Tatham v.*

Wright, 5 Nev. & M. 132; 4 Bing. N. C. 489; 2 Nev. & P. 305.

others by this characteristic difference, that such evidence may be resorted to in the first instance as original evidence, whilst all other mediate testimony is admissible only on a principle of necessity, as SECONDARY evidence, after the failure of evidence of a higher and more satisfactory nature (*a*).

Secondary
mediate
testimony.

Next, as to such mediate testimony as is of a *secondary* description.

As information derived mediately through another person is in its own nature inferior in point of certainty to that which is derived immediately from an eye or ear witness (*b*), so, even in cases

(*a*) There is this essential distinction between a declaration which is admissible as accompanying an act, and one admissible merely as secondary evidence; in the former case, the admissibility results immediately from its connection with a fact material to the cause, and already in evidence; whilst to warrant the admission of secondary evidence, a foundation must first be laid by proof of extrinsic circumstances, usually unconnected with the cause.

(*b*) The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of the fact derived from actual perception of the fact by the senses; and even this degree of evidence is obviously capable of being strengthened or weakened by particular circumstances. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to their consideration. In some instances, however, an inspection by the jury conduces to their decision; where the question turns upon local situation, a view is necessary. So the Judges, in cases of mayhem, act *super visum vulneris*; so a jury of matrons, upon a plea of pregnancy, inspect the person of the prisoner. The degree of evidence which ranks the second in the scale, consists of information derived, not from actual perception by our senses, but from the relation and information of others who have had the means of acquiring actual knowledge of the facts, and in whose qualifications for acquiring that knowledge, and retaining it, and faithfulness in afterwards communicating it, we can place confidence.

Information thus derived is evidently inferior, in point of certainty, to that knowledge which is acquired by means of the senses, since it is one step removed from the highest and most perfect source. The truth of the fact in question depends upon the powers of perception possessed by another; the opportunity afforded him of applying them; his diligence in making that application; the strength of his recollection, and his inclination to speak or to write the truth. It is, however, upon knowledge thus derived that juries must in general act; they must be informed of the *res gesta* by those who have been eye and ear witnesses of them; their means of knowledge, and their faithful communication of it, being guarded by the securest means which the law can devise. A third, and still inferior ground of belief, consists in information which we derive, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows nothing more of the fact than that it has been asserted by some other person: this species of evidence, which is generally termed *hearsay* evidence, is evidently inferior, in point of certainty, to the former, even for the common purposes of daily intercourse in society; for although the author of the assertion may be known, and his veracity highly appreciated, there is a greater latitude afforded for deception, mistake, and misapprehension, and for defect of memory, and hence a degree of doubt must result, which must evidently be increased in proportion to the number of persons through whom the communication has been transmitted; and, consequently, where the author is unknown, and the number of in-

where the party from whom such testimony is derived delivered it under the sanction of a judicial oath, and although the party to be affected by it had the opportunity to cross-examine, yet the testimony so given would still be inferior in degree to the direct testimony of the same witness, and consequently such inferior evidence would be excluded by the general principle already adverted to, so long as the original witness could himself be produced.

Secondary
mediate
testimony.

But in ordinary cases, where the testimony formerly given consists of mere declarations, which rest principally, if not entirely on the credit of the party who made them, such evidence is of a still weaker and more imperfect description, not being sanctioned by either of the great tests of truth already mentioned. Hence the general rule of law is, that such evidence cannot be received except in particular instances where the necessity is urgent, and peculiar considerations sanction a departure from the general rule.

intermediate parties who have acted in the transmission is also unknown, the knowledge must also be vague and uncertain, even as applied to the common affairs of life. But for the purposes of proof in a court of justice, a still stronger reason operates to the rejection of such evidence, namely, that it cannot be subjected to the ordinary tests which the law has provided for the ascertainment of truth, the obligation of an oath, and the opportunity afforded for cross-examination; for these, or equivalent ones, are the guarantees of truth, which the law in ordinary cases invariably requires. In the common course of life, evidence of this nature is frequently, nay usually, acted upon without scruple; but in the ordinary affairs of life there is, in general, no considerable temptation to deceive: on the contrary, a legal investigation of a fact, which involves the highest and dearest interests of the parties concerned—property, character, nay liberty, or life itself—presents the greatest possible temptations to deceive; and therefore that evidence which is admitted before a jury must be guarded and secured by greater restraints, and stricter rules, than those which are sufficient for the common purposes of life.

If it were to be assumed, that one who had been long enured to judicial habits might be able to assign to such evidence just so much and no greater credit than it

deserved, yet, upon the minds of a jury, unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard, when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biassed by the character of the person from whom the evidence was derived. In addition to this, since every thing would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral issues.

Upon these grounds it is that the mere recital of a fact, that is, the mere oral assertion or written entry by an individual that a particular fact is true, cannot be received in evidence.

Mediate
secondary
evidence.

Where a witness to facts might be produced and examined on oath, little doubt could be entertained that hearsay evidence of his mere declaration, heard and detailed by another, ought to be excluded, so infinitely inferior in degree must such hearsay evidence be when compared with direct testimony delivered in open court.

Immediate testimony is given under the solemn sanction of an oath, in the presence of the public ; the jury have the advantage of observing the deportment of the witness, the manner in which he gives his testimony ; in particular, whether, as one relying on the consistency of truth, he answers promptly and readily according to the suggestions of his memory, or with hesitation and difficulty, either attempting to evade direct answers, or to gain time to weigh them, in order to avoid contradictions and inconsistency ; whether he readily answers all questions indifferently, whether they make in favour of or against the party whose witness he is, or he gives favourable answers on the one side with willingness and readiness, on the other with difficulty and reluctance. The attention of such a witness is called directly and immediately to the very facts the disclosure of which is material ; his means of knowledge, his memory, and his situation, connection with the parties, and his motives, are subject to the severe and trying test of cross-examination, by means of which fraudulent witnesses are often surprised and detected.

In all these important particulars mediate testimony is usually defective ; for although no doubt be entertained that the witness examined heard from another the statement which he is ready to repeat, yet that other did not make the communication under the sanction of an oath ; there are no sufficient means of ascertaining whether he had the opportunity or the capacity for minute and accurate observation, nor of judging as to the tenacity of his memory : his attention in making the communication may not have been sufficiently directed to many of the particular facts, which afterwards appear to be material ; he may have omitted many which are important, or not knowing that any such use would afterwards be made of his declarations, may have expressed himself without that caution and accuracy which he would have deemed to be necessary had he been examined under the sanction of an oath before a public tribunal, having his attention particularly directed to each material fact, and with a full knowledge of the important consequences which might result from his testimony with respect to the property, liberty or lives of others, and the necessity for attention and caution in his answers. In addition to

this, he may have been induced to misrepresent facts on the particular occasion, under the influence of indirect motives, which, without the opportunity of cross-examination, it is impossible to trace or even to surmise.

Mediate
testimony.

Where the communication is derived through several intermediate witnesses, it is still weaker in degree; there is greater latitude afforded for misunderstanding and mistake, or even designed wilful misrepresentation; and it is more difficult to appreciate the veracity of the original witness, the means which he possessed of acquiring information, and the motives by which he was actuated in making the communication. Ordinary experience shows how little credit is due to such mediate testimony, and how frequently it happens that even most absurd and improbable reports acquire credit.

But where such immediate testimony is *unattainable*, and declarations oral or written can be proved to have been made, why, it may be asked, should not these, in default of better evidence, be admitted; as such evidence would, in numerous instances, be sufficient to convince an ordinary individual, why should truth derivable from such evidence be excluded? The answer is, because if such evidence were *generally* receivable, the uncertainty and confusion which would result from its general reception would far outweigh the benefit which might possibly be derived from its admission in particular instances.

The law for regulating the reception of evidence ought to proceed upon certain grounds, and prescribe plain and determinate limits: if none were to be prescribed, the most serious inconvenience would be experienced in the administration of justice; the trials of causes would be unnecessarily protracted by the admission of unnecessary evidence, and the attention of the jurors would often be distracted from the consideration of that which was material and useful, and applied to that which was unimportant or even irrelevant: on the other hand, indefinite and obscure boundaries, which occasioned the admission of evidence to be encumbered with doubts and difficulties, would be worse than none.

To take a strong case: suppose that a man, asserting that he is urged by the reproaches of his conscience to confess a crime of great enormity, surrenders himself into the hands of justice, and that his ample confession involves others as having been his guilty associates; it may easily be supposed that in such a case the apparently sincere penitence of the self-accuser, and the great improbability that such a statement under the circumstances could

Mediate
testimony.

possibly be founded on any but sincere motives, would strongly tend to induce one who heard the confession and knew the circumstances under which it was made to give it credit. This may readily be admitted: the question, however, is not what might happen under special circumstances, but whether they warrant a general rule, and whether a general rule which would include such evidence would not also include a great deal more of a suspicious and unsatisfactory nature. In order to form a conclusion on this subject, all peculiar and adventitious circumstances as to the particular manner, conduct and demeanour of the penitent, his expressions of sorrow and contrition, must be left out of the account; these are merely adventitious, and are circumstances in themselves too variable and indefinite to furnish a rule of admission or exclusion. Stripped of such merely casual circumstances as, whatever their influence might be in particular instances, could supply no general and certain rule, the question would be, whether the consideration that the party accusing another avowed his own guilt, to the same or it may be to a less extent, supplied a general sanction for the reception of such evidence. On this question it is difficult to raise a doubt.

To ascertain by what impulses and motives a person so situated might be actuated in making such a statement, is far beyond the power of human wisdom; that he was really the guilty person he avowed himself to be, might indeed be readily inferred so far as he alone was concerned; but in charging others as his associates, it is far from impossible that he might practise deceit or misrepresentation from sinister motives: it might be in the hope of procuring in his own favour a mitigation of punishment or even a pardon; it might be for the purpose of extenuating his own conduct; or even that he acted from motives of malice and revenge, or for the sake of reward, in a case where security and reward were held out as inducements to a detection, or might expect such a result in the event of the conviction of the party whom he thus charged with being a guilty associate.

To establish therefore a general rule, that where a self-accuser at the time of his confession charged another with the commission of the same crime, the confession should be received against the latter, would be to admit evidence in many cases of too suspicious and dangerous a description to be relied on generally, especially by juries, who would frequently be destitute of those collateral aids which would enable an individual acquainted with all the minute circumstances of the case to form his own judgment, and who for want of such means might frequently be induced to give credit to

a statement where an individual would have withheld his confidence altogether.

Again, in respect of civil liability, it is very possible that a declaration by *A.* that he was jointly liable with *B.* to the payment of a debt or duty, would, under particular circumstances, entitle him to credit; it might be that the very circumstance of his at once admitting his own responsibility would be a sanction for believing that *B.* was also liable: but it might also happen that such an admission was but a mere artifice, resorted to for the purpose either of causing another who was not liable to contribute to the payment of *A.*'s debt, or even resulted from collusion with one setting up a false claim to defraud *B.*

Mediate
secondary
evidence.

It is obvious, therefore, that a general rule which admitted the mere statement of one man to be used against another, merely on the ground that such statement was apparently contrary to the interest of him who made it, though it would occasionally tend to the ends of justice, would in other instances be productive of mischief and injustice.

But if the consideration that the statement was apparently contrary to the interest of the party who made it, would not in general warrant its reception, it is plain that the reasons for exclusion would operate still more forcibly to the general exclusion of statements the reception of which was not sanctioned by some general rule of law. In individual instances, casual and adventitious circumstances, and in particular a full conviction of the veracity and accuracy, as well of the party who made as of the party who communicated the declaration, would be a sufficient ground for belief, on which an individual might safely act; but such special grounds can seldom form the basis of a general rule; and the consideration that a man might in particular instances trust to such evidence, would supply no sufficient reason for the general reception of such evidence before a jury, who would usually be destitute of those peculiar means of judging of the credit due to the evidence by the aid of which an ordinary individual would be enabled to decide, and consequently be peculiarly liable to imposition were such evidence to be generally admissible.

Hence it is that, except in the instances which will presently be noticed, where a rule of exception can be established to the contrary, the law excludes all mediate or hearsay evidence of mere declarations made by others to those who are sworn and examined. In so doing, the truth may sometimes be excluded, but ample compensation is made by the further exclusion of a mass of evidence which would tend to deceive and mislead: the result is, on the whole,

Mediate
secondary
evidence.

greatly on the side of justice; the rule obstructs one source of truth, but it also excludes a flood of error.

Next, then, in what instances and under what sanction does the law admit mediate secondary evidence?

Depositions
of wit-
nesses in
former pro-
ceedings.

In the first place, then, it seems to be a general rule, that where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence; for in such case the testimony was given under the obligation of an oath, and the adversary had or might have had the benefit of a cross-examination.

Where, however, the party against whom the evidence is offered had not the opportunity to cross-examine, the deposition or examination is usually inadmissible, at least its admissibility is not warranted by the rule just adverted to. On this ground it is that the depositions of witnesses taken by magistrates in cases of felony, under the statutes 1 & 2 Ph. & M. c. 10, and 2 & 3 Ph. & M. c. 13, though admissible when taken in the presence of the prisoner, who has thus had the opportunity to cross-examine, have been held to be inadmissible as depositions when taken in the absence of the prisoner (c). It is again to be observed, that where a party against whom such evidence is offered had the opportunity to cross-examine, it is the same thing in effect as if he had availed himself of the opportunity, provided it was taken in the course of a proceeding to which he was a party, for otherwise he was not bound to pay any attention to it.

Tradi-
tionary
evidence.

The first great class where mediate testimony is receivable as secondary evidence on special grounds, although the statement was not on oath, and although the adversary had no opportunity to cross-examine, consists of the declarations made by persons since deceased, on the subject of pedigree, custom, boundary, and the like, where from the nature of the subject-matter of the declaration and situation of the party it is reasonably to be presumed that he knew the fact.

In the first place, the fact to be proved must be of a public nature; otherwise it is not to be presumed that the individual from whom the tradition was derived had the means of knowledge.

2dly, As in the case of general reputation, such evidence must, in all cases where any question of public concern is in issue, be confined to general declarations, to the exclusion of mere declarations as to particular facts.

(c) *Infra*, tit. DEPOSITIONS; and see Vol. II. tit. DEPOSITIONS. It has been said that a deposition before coroners is

admissible after the death of the witness, although not taken in the presence of the prisoner; *sed qu.*

3dly, Traditionary evidence as to rights must be derived from those persons who were in a situation to know what the rights were; and in the case of pedigree, declarations are not admissible unless they be derived from such as were connected with the family.

3. Derived from persons likely to know the facts.

4thly, As evidence of this description partakes of the weakness and infirmities of hearsay report (*d*), its credibility depends mainly on the absence of all temptation to misrepresent the facts; it follows that it cannot be trusted, and is inadmissible, under circumstances which were likely to influence and bias those from whom it is derived. Upon this principle it has been held that a declaration relating to a pedigree made *post litem motam*, cannot be received (*e*). But in the case of *Nicholls v. Parker* (*f*), traditionary evidence of what old persons, then dead, had said concerning the boundaries of the parish and manors (the subject of the action) was admitted in evidence, although the old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations, there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending. (Although, in fact, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties.) So that those persons could not be considered as having it in view to make declarations for themselves at the time.

Must be free from suspicion.

Lastly, as in the case of general reputation, such evidence is of little or no weight, unless it be supported and confirmed by evidence

(*d*) Grose, J., in the case of *Morewood v. Wood*, 14 East, 330, states the case of a pedigree which was tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it; but after all, the whole was overturned, and proved to have no foundation whatsoever, by the production of a single paper from the Herald's office; which shows (observed the learned Judge) how cautiously this sort of evidence ought to be admitted. See also Lord Ellenborough's observations, 1 M. & S. 616, 7, where he observes that reputation in general is weak evidence; and of Buller, J., *Morewood v. Wood*, 1 M. & S. 330.

(*e*) *Case of the Berkeley Peerage*, 4

Camp. 401. See the case below, tit. PEDIGREE; and see *Rex v. Cotton*, 3 Camp. 444, cor. Dampier; where, upon an indictment against an occupier of a farm, for not repairing a road *ratione tenuræ*, an award made many years before, when the same subject was in dispute between a former occupier and the township, was rejected as inadmissible, on the ground that the declarations of witnesses, since deceased, made before the arbitrator on that occasion, could not have been received, having been made *post litem motam*, and that the opinion of the arbitrator, founded upon such testimony, could not be entitled to greater credit.

(*f*) 14 East, 331.

of the actual exercise and enjoyment of the right to which such traditional declaration relates.

Declarations, &c. made against the interest of the party.

In the next place, notwithstanding the general rule, that the mere declarations of a person, as to a particular fact, are not evidence of that fact; and notwithstanding the limitations by which the reception of evidence of reputation and tradition is guarded, particularly those which confine the admission of such evidence to matters of some public nature and interest, and exclude reputation and tradition, which relate merely to particular facts; there are some cases which form exceptions to these rules, and where the privacy of the fact, so far from excluding the hearsay declaration concerning it, seems to induce the necessity of its admission. As far as these are referable to any certain principles (for some of them have been looked upon as mere anomalies and arbitrary exceptions, and the boundaries by which this class of cases is to be limited are not very clearly ascertained) (*g*), they seem to be confined to instances of facts known only to a few individuals who possessed peculiar means of knowledge, and consequently where, if the declaration of such individuals were not admissible, all evidence on the subject would be excluded. And, secondly, according to the authorities, the reception of such declarations seems to be principally warranted by the consideration that the declaration or entry was made against the interest of the party who made it, which affords a presumption that the fact was true; or, at all events, it seems to be necessary that the declaration should have been made by one who had peculiar knowledge of the fact, and who had no interest to falsify it (*h*). Most of these exceptions seem to have been founded upon the presumption, that the party who made the entry or declaration would not have made it contrary to his own interest, unless it had been true. Where a steward has admitted, by entries in his accounts, the receipt of rents (*i*), or churchwardens have made similar entries of the receipt of monies from the inhabitants of a subdivision of the parish, for parochial purposes, such admissions have been held to be evidence of payments for those purposes (*h*).

The declaration of a deceased tenant, that he held the land under a particular person, was held to be admissible to prove the seisin of that person; such a declaration was in some degree against his

(*g*) See Lord Kenyon's observation, 5 T. R. 123.

(*i*) *Barry v. Bebbington*, 4 T. R. 514.

(*h*) See Lord Ellenborough's observations in *Roe v. Rawlings*, 7 East, 290.

(*k*) *Stead v. Heaton*, 4 T. R. 669.

interest, since it would have been evidence against him, by the landlord, in an action for use and occupation (1).

Mediate
secondary
evidence.

There are, however, several instances to be found where the declaration as to a fact, by a party who possessed peculiar means of knowing the fact, and laboured under no temptation, bias or influence, to misrepresent it, has been admitted in evidence after his death. As the rules by which the reception of this class of evidence is governed do not appear to be very distinctly defined, the decisions on the subject will be detailed at a future opportunity; for the present, it will suffice to make a few observations on the general principle which ought to regulate the admissibility of such evidence.

In the first place, as such mediate testimony is in general excluded on the grounds already adverted to, it is essential that some special necessity should exist in the particular class of cases for deviating from the general rule, and that such evidence should never be resorted to until the higher degree of evidence be no longer attainable.

And even then, in order to warrant the reception of such secondary evidence, it is essential that circumstances should exist which afford a reasonable presumption that the person who spoke or wrote that which is offered in evidence had peculiar means of knowing the fact, and that he was not likely to have misrepresented it. The circumstance that the entry or declaration was contrary to the interest of the party who made it, affords, as has been already observed, sufficient reason for presuming on his veracity, to the extent at least of admitting the declaration or entry to be read in evidence.

There may, however, be many instances where such evidence derives credit from circumstances, independently of the consideration of an interest to the contrary on the part of the person who made it: where, for instance, it is made by a party in the usual course of his profession, trade or business. An entry so made obviously derives its claim to credit from a consideration of the great improbability that such a person would, without any assignable motive, wantonly make an entry of a false fact. The consideration that the entry was accompanied with this further circumstance, viz. that it contained an acknowledgment as of the receipt of money,

(1) *Uncle v. Watson*, 4 Taunt. 16. See also *Perigal v. Nicholson*, 1 Wightw. 65. See also *Higham v. Ridgway*, 10 East, 109, where it was held that an entry made by a deceased man-midwife that he had delivered a woman of a child on a particular day, and referring to his ledger, in which the charge for his attendance was marked *paid*, was evidence on the trial of an issue as to the age of the child.

Mediate
secondary
evidence.

by which, if untrue, the party might be prejudiced, is entitled to very little weight, and more perhaps is attached to it than it really deserves; for in the absence of all suspicion of fraud, and supposing the entry to be genuine, the circumstance that the party had been paid for a particular service stated to have been performed, would not materially add to the probability derived from the mere entry itself; and the probability of fraud in the one case rather than the other, founded on the acknowledgment against the interest of the party, is of little or no weight; for it would be just as easy for one who made a false entry with a view to evidence, to make it with as without such an admission or acknowledgment as might, if genuine, weigh against his own interest.

The bare possibility of the casual publication of a false entry, made for the purpose of future evidence, could have little weight when compared with the importance of the object to be ultimately attained.

In such cases, therefore, no distinction can be made on the supposition or probability of fraud, in the one case, rather than the other; it must, to prevail, depend on the position, that where the entry contains no acknowledgment against the interest of the vouchee, there exists a greater probability that it was wantonly, carelessly, or mistakenly made; this, however, must depend on the circumstances under which it was made; if it was a written entry made in the usual course of a man's profession or trade, in the absence of fraud, it carries with it a reasonable degree of probability that it was made according to the truth. At all events, it is difficult to see how the further circumstance of admitted payment can stamp the evidence with such an additional degree of credit, as to make the difference between the admission of the evidence and its absolute rejection.

By way of illustration, suppose a professional accoucheur to have made an entry in the ordinary course, of his attendance on a particular individual, and her delivery of a son: in the absence of all suspicion of fraud, could it fairly be doubted that the fact had taken place; could it be supposed that, without motive, such a person would wilfully have made an entry, of a fact which he knew to be untrue? In such a case, how would the addition that he had received such a fee for his attendance, operate? Not at all, it is quite clear, so far as any suspicion of fraud was concerned, for it would have been just as easy to make that addition as to omit it; and if such an entry were forged, the addition, it is clear, would not have been omitted. Mistake, in such a case, is out of the question. How then does any consideration of interest

operate? How can such an entry, doubly false, in stating a service done and remuneration made, affect the interest of a party? How, if published, is it to operate to his prejudice? but still more, how is it to have that effect when it remains in his own private keeping? If these observations be just, it follows that, although, the admission of mediate secondary evidence may, in some instances, be founded on the consideration that the original declaration or entry was made contrary to the interest of the party who made it, yet that where it is sanctioned by the consideration that the entry was made in the ordinary course of a man's profession, trade or business, the mere circumstance of an admission made remotely against his interest is of little weight.

Mediate
secondary
evidence.

Next, as to the admission of indirect evidence.

Indirect
evidence.

Having now briefly noticed the general principles which govern the reception of direct evidence to prove a disputed fact by the aid of testimony, whether immediate or mediate, we are next to consider those which govern the admission of indirect evidence; that is, of facts collateral to the disputed fact, but from the existence of which the truth of the fact in dispute may be inferred.

The necessity for resorting to indirect or circumstantial evidence is manifest. It very frequently happens that no direct and positive testimony can be procured; and often, where it can be had, it is necessary to try its accuracy and weight by comparing it with the surrounding circumstances.

Necessity
for resort-
ing to in-
direct evi-
dence.

The want of written documents, the treachery and fallaciousness of the human memory, the great temptations which perpetually occur to exclude the truth, by the suppression of evidence, or the fabrication of false testimony, render it necessary to call in aid every means of ascertaining the truth upon which the law can safely rely.

Where direct evidence of the fact in dispute is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. It is possible that some circumstances may be misrepresented, or acted with a view to deceive; but the whole context of circumstances cannot be fabricated; the false invention must have its boundaries, where it may be compared with the truth; and therefore, the more extensive the view of the jury is of all the minute circumstances of the transaction, the more likely will they be to arrive at a true conclusion. Truth is necessarily consistent with itself; in other words, all facts which really did happen, did actually consist and agree with each other. If then the circumstances of the case, as detailed in evidence, are incongruous and inconsistent, that incon-

Evidence
of circum-
stances
connected
with the
fact.

sistency must have arisen either from mistake, from wilful misrepresentation, or from the correct representation of facts prepared and acted with a view to deceive. From whatever source the inconsistency may arise, it is easy to see that the greater the number of circumstances which are exhibited to the jury, the more likely will it be that the truth will prevail; since the stronger and more numerous will be the circumstances on the side of truth. It will be supported by facts, the effect of which no human sagacity could have foreseen, and which are therefore beyond the reach of suspicion: whilst, on the other hand, fraudulent evidence must necessarily, either be confined to a few facts, or be open to detection, by affording many opportunities of comparing it with that which is known to be true. Fabricated facts must, in their very nature, be such as are likely to become material. Hence it has frequently been said, that a well-supported and consistent body of circumstantial evidence is sometimes stronger than even direct evidence of a fact; that is, the degree of uncertainty which arises from a doubt as to the credibility of direct witnesses, may exceed that which arises upon the question whether a proper inference has been made from facts well ascertained. A witness may have been suborned to give a false account of a transaction to which he alone was privy, and the whole rests upon the degree of credit to be attached to the veracity of the individual; but where a great number of independent facts conspire to the same conclusion, and are supported by many unconnected witnesses, the degree of credibility to be attached to the evidence increases in a very high proportion, arising from the improbability that all those witnesses should be mistaken or perjured, and that all the circumstances should have happened contrary to the usual and ordinary course of human affairs. The consideration, however, of the credit due to circumstantial evidence, belongs to another place (m); at present, the subject is mentioned merely with a view to illustrate the necessity of opening to a jury the most ample view of all the facts which belong to the disputed transactions; leaving the consideration of the importance due to such evidence to be examined hereafter.

Juries formerly returned from the vicinage.

Agreeably to this notion, and according to the simplicity of the ancient law, it was provided that every trial should be had before a jury who lived so near to the scene of the disputed transaction that they might reasonably be supposed to possess actual and personal knowledge of the circumstances, to have heard and seen what was done (n). Later experience has shown that a knowledge

(m). Vide *infra*, tit. CIRCUMSTANTIAL EVIDENCE.

(n) See the observations made above.

of the facts to be tried, such as a residence in the neighbourhood supplies, affords but an imperfect and dubious light for the investigation of truth; and that justice suffers more from the prejudices and false notions of the facts which a residence in the neighbourhood usually supplies, than it gains in point of certainty from a previous knowledge, on the part of the jury, of the parties or of the circumstances of the case. At this day, therefore, it is no longer necessary, either in civil or in criminal cases, that the jury should be returned from the vicinage; they are taken, without distinction, from the body of the county at large; and being in general strangers to the litigant parties and to the facts in dispute, may be presumed to discharge their important duties without partiality or prejudice. Still, however, the end to be attained is the same, although the means of attaining it are different; it is still the great object of the law that the jury should be fully possessed of all the facts and circumstances of the case; and as they have not been actually witnesses of the transaction, either in fact or in contemplation of law, the scene is to be exhibited to them by the only means of recalling a past transaction, that is, by oral evidence and written documents, and the jury are to collect the facts by the senses and perceptions of others, to whose account credit is due.

Ancient
practice as
to juries.

In consequence, too, of the frequent failure of direct and positive evidence, recourse must be had to presumptions and inferences from facts and circumstances which are known, and which serve as indications, more or less certain, of those which are disputed and contested. It is, consequently, a matter of the highest importance to consider the grounds, nature and force of such indirect evidence; and to inquire what facts, either singly or collectively, are capable of supplying such inferences as can safely be acted upon (o).

Presumptions, and strong ones, are continually founded upon knowledge of the human character, and of the motives, passions and feelings, by which the mind is usually influenced. Experience and observation show that the conduct of mankind is governed by general laws, which operate, under similar circumstances, with almost as much regularity and uniformity as the mechanical laws of nature themselves do. The effect of particular motives upon human conduct is the subject of every man's observation and experience, to a greater or less extent; and in proportion to his attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture, on the one

Foundation
of presump-
tions as to
motives.

(o) See Vol. II. tit. PRESUMPTIONS.

Foundation
of presump-
tions as to
motives.

hand, what would be the effect and influence of motives upon any individual under particular circumstances ; and on the other hand, is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily adduced in courts of justice of the particular motives by which a party was influenced, in order that the jury may infer what his conduct was under those circumstances ; and on the other hand, juries are as frequently called upon to infer what a man's motives and intentions have been, from his conduct and his acts. All this is done, because every man is presumed to possess a knowledge of the connection between motives and conduct, intention and acts, which he has acquired from experience, and to be able to presume and infer the one from the other.

Presump-
tions from
conduct.

The presumption of conduct, or of any particular act, from the motives by which the supposed agent was known to be influenced, is more or less cogent as the motive itself was stronger or weaker, and as experience has proved it to be more or less efficacious in affecting a man's conduct. The presumption of particular intention, from a man's acts and conduct, is more or less forcible, according to their nature, and their greater or less tendency to effect the supposed intention, and the improbability, derived from experience, that they could have resulted from any other motive, or have been done with any other intention. Presumptions of this nature are of most essential importance in criminal cases. Where a heinous crime has been committed, as for instance, murder, by means of poison, and where it is obvious that theft was not the object of the guilty party, it is essential to inquire whether the accused was influenced by any motive to commit such an offence ; the absence of all motive, whether of avarice or, revenge, affords a strong presumption of innocence, where the fact is in other respects doubtful, because experience of human nature shows that men do not commit mischief wantonly and gratuitously, without any prospect of advantage ; still less do they perpetrate enormous crimes, and subject themselves to the severest penalties of the law, without the strongest motives : when, on the contrary, other strong presumptions appear against the accused, the knowledge that he was influenced by a very strong motive to commit such a crime, must of necessity greatly add to the probability of his guilt.

Presump-
tions from
conduct as
to motive.

In criminal cases a question usually arises as to the intention of the accused, since it is, in general, the guilty intention with which an act is done that renders it criminal ; and in numerous instances

a particular intention is made an essential ingredient in the statutory offence. But intention, which is the mere internal and invisible act or resolve of the mind, cannot be judged of except from external and visible acts; and in all such cases, and many others, a man's object and motives must be inferred from his *conduct*; and what particular acts and conduct are sufficient to indicate the guilty intention which is imputed to the accused, is a question of fact to be decided by those who are conversant in human affairs, and whose experience enables them to judge of the connection between conduct and intention.

Presump-
tions from
conduct as
to motive.

In many of the common concerns of life a man may act from a complication of motives which human sagacity cannot unravel; the secret workings of which Omniscience alone can understand; but in the case of a crime defined by the law, and where, consequently, both the act itself and the intention are simple and definite, so much difficulty does not prevail in the ascertainment of intention; in such instances it is reasonable to infer, that a man intended and contemplated that end and result which is the natural and immediate consequence of the means which he used; and this is the ordinary presumption of law. In criminal proceedings, the consideration of the *conduct* of the accused will, in other respects, be found to be of great importance in determining upon his guilt or innocence, where there is either no direct evidence of the fact, or such as cannot standing alone be safely relied upon.

The *conduct* which may afford an inference in such a case, may consist either in the seeking opportunities and means for committing such an act, or in attempting to avoid suspicion or injury by flight, or in concealing evidence of guilt, or even in showing an anxiety to do so; for it is certain that the guilty person must have had the opportunity and means of committing the offence; and it is probable that he would previously watch for such an opportunity, and he must have procured the means. Again, it is also probable that the guilty person, goaded by the stings of conscience, or at least actuated by fear of detection and of punishment, would use every effort within his power to avoid suspicion, or at least inquiry; and experience fully proves that means, in the hour of terror and alarm, are often resorted to by the guilty, in the hope of providing security, which, so far from preventing or lulling suspicion, provoke and excite it, and turn out to be forcible evidence of guilt. Flight; the fabrication of false and contradictory accounts, for the sake of diverting inquiry; the concealment of the instruments of violence; the destruction or removal of proofs tending either to show that an offence has been com-

Presump-
tions as to
motives.

mitted, or to ascertain the offender, are circumstances indicatory of guilt, since they are acts to which *some* motive is attributable, and are such as are not likely to have been adopted by an innocent man ; but such, on the contrary, as according to experience are usually resorted to by the guilty. A full *confession* (*p*) of guilt, although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacrifice his life, liberty, or even his reputation, by a declaration of that which was untrue. The presumption immediately ceases as soon as it appears that the supposed confession was made under the influence of threats or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or of punishment. It may be proper also to remark in this place, that some of those presumptions which have lately been touched upon are to be regarded with great caution ; for it sometimes happens that an innocent, but weak and injudicious person, will take very undue means for his security, when suspected of a crime. A strong illustration of this is afforded by the case of the uncle, mentioned by Lord Hale. His niece had been heard to cry out, "Good uncle, do not kill me !" and soon afterwards disappeared ; and he being suspected of having destroyed her, for the sake of her property, was required to produce her before the justices of assize : he being unable to do this, (for she had absconded,) but hoping to avert suspicion, procured another girl resembling his niece, and attempted to pass her off as such. The fraud was however detected ; and, together with other circumstances, appeared so strongly to indicate the guilt of the uncle, that he was convicted and executed for the supposed murder of the niece, who, as it afterwards turned out, was still living.

Presump-
tions from
conduct.

In civil cases also, the most important presumptions are (as will be afterwards more fully seen) continually founded upon the conduct of the parties : if, for instance, a man suffer a great *length of time* to elapse without asserting the claim which he at last makes, a presumption arises, either that no real claim ever existed, or that, if it ever did exist, it has since been satisfied (*q*) ; because, in the usual course of human affairs, it is not usual to allow real and well-founded claims to lie dormant. So the uninterrupted enjoyment of property or privileges for a long space of time raises a presumption of a legal right ; for otherwise it is probable that the enjoy-

(*p*) See tit. ADMISSION—CONFES-
SION.

(*q*) See Vol. II. tit. PRESUMPTIONS—
LIMITATION—PRESCRIPTION.

ment would not have been acquiesced in (r). Upon this principle the Legislature seems to have founded the provision in the Statute of Limitations, which raises a presumption that after a lapse of six years a debt on simple contract has been satisfied; a presumption liable to be rebutted by proof of a promise to pay the debt, or an acknowledgment that it still remains due, made within the six years (s).

Presump-
tions from
conduct.

The *conduct* of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him; since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice. So forcible is the nature of this presumption, that the law founds upon it a most important elementary rule, which excludes secondary evidence where evidence of a higher degree might have been adduced; and this it does, because it is probable that a party who withholds the best and most satisfactory evidence from the consideration of the jury, and attempts to substitute other and inferior evidence for it, does so because he knows that the better evidence would not serve his purpose (t).

Omission
to produce
evidence
within the
knowledge
and power
of the
party.

Upon the same principle, juries are called upon to raise an inference in favour of a defendant from the goodness of his character in society; a presumption too remote to weigh against evidence which is in itself satisfactory, and which ought never to have any weight except in a doubtful case (u).

Upon similar grounds, presumptions may be derived from the artificial course and order of human affairs and dealings, wherever any such course and order exist; because, in the absence of any reason to suppose the contrary, a probability arises that the usual course of dealing has been adopted. Hence presumptions are founded upon the course of trade (x), the course of the post, the customs of a particular trade, or of a particular class of people, and even the course of conducting business in the concerns of a

Presump-
tions from
the course
of dealing.

(r) Where a party neglects to take out execution within a year after his judgment, he must, in general, revive it by *scire facias* before he can proceed to execution; and this is founded upon a presumption that the debt or damages have in the meantime been paid.

(s) See tit. LIMITATIONS. Such promises, to be available, must now be in writing.

(t) Vide *infra*, tit. BEST EVIDENCE.

(u) See tit. CHARACTER.

(x) To prove the manner of conducting a particular branch of trade at one place, evidence may be given of conducting the same branch at another. *Noble v. Kennaway*, Doug. 510.

private individual, to prove a particular act done in the usual routine of business (*y*).

In all such cases the course of dealing may be proved before the jury, and is evidence in matters connected with it. The usual time of credit in a particular trade is evidence to show that goods were sold at that credit; the course of the post is evidence to show that a particular letter, proved to have been put into the post-office, was received in the usual time by the party to whom it was directed. The ground of presumption in this and a multitude of similar instances is, that where a regular course of dealing has once been established, that which has usually happened did happen in the particular instance; and such presumptions, like all others, ought to prevail, unless the contrary be proved, or at least be encountered by an opposite presumption.

Presump-
tion as to
continu-
ance.

Where a fact or relation is in its nature continuous, after its existence has once been proved, a presumption arises as to its continuance at a subsequent time; for, from the nature of the fact or relation, a very strong presumption arises that it did not cease immediately after the time when it was proved to exist; and as there is no particular time when the presumption ceases, it still continues; therefore, where a *partnership* between two persons has once been established, its continuance at a later period is to be presumed, unless the termination be proved (*z*). So, where the existence of a particular individual has once been shown, it will, within certain limits, be presumed that he still lives. The presumption as to a man's life after a number of years must depend upon many circumstances; his habits of life, his age, and constitution: the probable duration of the life of a person, as calculated upon an average, may of course be easily ascertained in every particular case; but for the sake of practical convenience, the law lays down a rule in some instances, which appears to have been very generally adopted, that after a person has gone abroad, and has not been heard of for seven years, it is to be presumed that he is dead (*a*). The various instances in which facts not in issue may properly be admitted in evidence in order to prove some other fact by inference from them, are far too numerous to be detailed on this occasion. Some of them will be more properly adverted to in considering the evidence peculiar to the proof of particular issues (*b*); suffice it to observe at

(*y*) See *Lord Torrington's Case*, 1 Salk. 285.

(*z*) See tit. PARTNERSHIP.

(*a*) See tit. POLYGAMY.—EJECTMENT BY HEIR AT LAW.—DEATH.

(*b*) Connections frequently consist in similarity of custom or tenure. See tit. COPYHOLD—CUSTOM; or in unity of design or purpose, see CONSPIRACY. In order to show the necessity of calling in the

present, that the admissibility of such evidence always depends on some natural or artificial connection between that which is offered to be proved and that which is proposed to be inferred.

In general, all the affairs and transactions of mankind are as much connected together in one uniform and consistent whole, without chasm or interruption, and with as much mutual dependence on each other, as the phenomena of nature are; they are governed by general laws; all the links stand in the mutual relations of cause and effect; there is no incident or result which exists independently of a number of other circumstances concurring and tending to its existence, and these in their turn are equally dependent upon and connected with a multitude of others. For the truth of this position the common experience of every man may be appealed to; he may be asked, whether he knows of any circumstance or event which has not followed as the natural consequence of a number of others tending to produce it, and which has not in its turn tended to the existence of a train of dependent circumstances. Events the most unexpected and unforeseen are so considered merely from ignorance of the causes which were secretly at work to produce them; could the mechanical and moral causes which gave rise to them have been seen and understood, the consequences themselves would not have created surprise.

Circumstantial and presumptive evidence in general.

It is from attentive observation and experience of the mutual connection between different facts and circumstances, that the force of such presumptions is derived; for where it is known from experience that a number of facts and circumstances are necessarily, or are uniformly or usually connected with the fact in question, and such facts and circumstances are known to exist, a presumption that the fact is true arises, which is stronger or weaker as experience and observation show that its connection with the ascertained facts is constant, or is more or less frequent.

The presumptions or inferences above alluded to are chiefly those which are deducible by virtue of mere antecedent experience of the ordinary connection between the known and the presumed facts (c); but circumstantial or presumptive evidence in general embraces a far wider scope, and includes all evidence which is of an indirect nature, whether the presumption or inference be drawn by virtue of previous experience of the connection between the known and the

said of the military to execute process, proof of acts of violence by the mob collected in another quarter, but collected for the same purpose as those about the plaintiff's house,

is admissible. *Burdett v. Colman*, 14 East, 183.

(c) See tit. CIRCUMSTANTIAL EVIDENCE.

inferred, facts (*d*), or be a conclusion of reason from the circumstances of the particular case, or be the result of reason aided by experience.

General rule, all facts are evidence which afford reasonable inferences.

From what has been said, it seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute; for, as has already been observed, so frequent is the failure of evidence, from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life. Let it be considered, then, *first*, what is the kind of evidence to which he would naturally resort; and in the next place, how far the law interferes to limit and restrain the reception of such evidence; remembering, at the same time, that all *artificial* and purely *conventional modes of evidence* form a subject for future consideration.

Natural course of inquiry on failure of direct evidence.

Where an ordinary inquirer could not obtain information from any witness of the fact which he was anxious to ascertain, either immediately from such witness, or mediately through others, or where the information which he had obtained was not satisfactory, his attention would be directed to the circumstances which had a connection with the transaction, as ascertained either by his own observation, or by means of the information of others, to enable him to draw his own conclusions; and in pursuing such an inquiry, where it was a matter of importance and interest, he would neglect no circumstances which were in any way connected with the transaction, which could, either singly or collectively, enable him to draw any reasonable inference on the subject. All his experience of human conduct, of the motives by which such conduct was likely to be influenced under particular circumstances, of the ordinary usages, habits and course of dealing among particular classes of society, or in particular transactions, even his scientific skill in medicine, surgery or chemistry, abstract probabilities or natural philosophy, might be called into action, to enable him, by a general and comprehensive view of all the circumstances, and their mutual relations to each other, to draw such a conclusion as reason, aided by experience, would warrant.

(*d*) See tit. CIRCUMSTANTIAL EVIDENCE; Vol. II. tit. PRESUMPTIONS, 3 Comm. 371; Gil. L. Ev. 160.

There is, in truth, no connection or relation, whether it be natural or artificial, which may not afford the means of inferring a fact previously unknown, from one or others which are known.

Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be immediately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption (e), in contradistinction to a conclusion derived from circumstances by the united aid of experience and reason.

Presumption.

Circumstantial proof is supplied by evidence of circumstances, the effect of which is to exclude any other supposition than that the fact to be proved is true.

Circumstantial evidence.

The nature and force of such proof will be more properly considered at another opportunity. The mere question at present is, how far the law interferes to limit and restrain the admission of evidence of collateral circumstances tending to the proof of a disputed fact.

In the first place, as the very foundation of indirect proof is the establishment of one or more other facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, in the same manner as if they were the very facts in issue.

The next question then is, what limit is there to the admission of collateral evidence for the purpose of indirect proof.

The nature of the evidence, and the principles by which it is to be appreciated, are, as has already been observed, to a great extent common to judicial and extrajudicial inquiries. Its force and efficacy, in the one case as well as in the other, must necessarily depend either on the known and ordinary connection between the facts proved and the fact disputed, or on the force and tendency of the facts proved to establish the truth of the disputed fact or issue, by the excluding any other supposition.

To what extent admissible.

Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of

(e) Such inferences are wholly independent of any actual knowledge of the necessity of the connection between the known and unknown facts. Many of the presumptions which we have to deal with, as connected with the present subject, are legal presumptions, where the law itself establishes a connection or relation between particular facts or predicaments; as that

the heir to a real estate was seised, or that a bill of exchange was founded on a good consideration. These, however, will be a subject for consideration when inquiry is made with respect to the artificial effect annexed by the law to particular evidence; for such presumptions are of an artificial and technical nature, whilst those at present considered are merely natural.

Res inter
alios acta,
grounds of
the rule.

direct evidence, but of supplying an invaluable protection against imposition. The law interferes to exclude all evidence which falls within the description of "*res inter alios acta*;" the effect of which is, as will presently be seen, to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct or declarations of strangers. And this rule is to be regarded, to a great extent at least, not so much as a limitation and restraint of the natural effect of such collateral evidence, but as a restraint limited by and co-extensive with the very principle by which the reception of such evidence is warranted; for the ground of receiving such evidence is the connection between the facts proved and the facts disputed; and there is no such general connection between the acts, conduct and declarations of strangers, as can afford a fair and reasonable inference to be acted on generally even in the ordinary concerns of life, still less can they supply such as ought to be relied on for the purpose of judicial investigation. And therefore this extensive branch of the rule which rejects the *res inter alios acta*, may be considered as founded on principles of natural reason and justice the same with those which warrant the reception of indirect evidence.

Declara-
tions by
strangers.

In the first place, the mere declarations of strangers are inadmissible, except in the instances already considered, where, on particular grounds, and under special and peculiar sanctions, they are admissible as direct evidence of a fact. Declarations so circumstanced may be used either for the purpose of directly establishing the principal fact in dispute, or for the purpose of proving the existence of collateral facts from which the principal fact may be inferred; but other declarations, which are of too vague and suspicious an origin to be received as evidence of the facts declared, must also, on the same principle, be rejected as indirect evidence. If such declarations as to the principal fact be inadmissible, they must also be at least equally inadmissible to establish any collateral fact, by the aid of which the principal fact may be indirectly inferred. It would be inconsistent to reject them when offered as direct testimony, but to receive them as collateral evidence, the more especially as even immediate testimony is in one sense but presumptive evidence of the truth; for it is on the presumption of human veracity, confirmed by the usual legal tests, that credit is usually (f) given to human testimony.

(f) Usually, but not necessarily; for belief, amounting to certainty, may be founded on the mere coincidence of testi-

mony, without any consideration of the credit due to human veracity.

If, for example, the question were whether *A.* had waylaid and wounded *B.*, if the declaration of a third person, not examined on the trial, that he saw the very fact, could not be received in evidence, neither, on any consistent principle, could his declaration that he saw *A.* near the place, armed with a weapon, be received in order to establish that fact as one of several constituting a body of circumstantial evidence.

Res inter alios, grounds of the rule.

For circumstantial proof rests wholly on the effect of established facts, and cannot, therefore, be properly founded wholly or in part on mere declarations, which are of no intrinsic weight to prove any facts (*g*).

Neither, in general, ought any inference or presumption to the prejudice of a party to be drawn from the mere acts or conduct of a stranger; for such acts and conduct are but in the nature of declarations or admissions, frequently not so strong; and such declarations are inadmissible, for the reasons already stated. An admission by a stranger cannot be received as evidence against any party; for it may have been made, not because the fact admitted was true, but from motives and under circumstances entirely collateral, or even collusively, and for the very purpose of being offered in evidence. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself (*h*), and his acts, conduct and declarations are evidence against him; but it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers. But if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct to be used as evidence against him for the purpose of concluding him; for this would be equally objectionable in principle, and more dangerous in effect, than the other. It is true, that in the course of the affairs of life a man may frequently place reliance on inferences from the conduct of others. If, for instance, *A.* and *B.* were each of them insurers against the same risk, *A.* to a large, and *B.* to a small amount, it is very possible that, on a claim made against each for a loss, which was admitted and paid by *A.* to the extent of his liability, *B.*, trusting to the knowledge and prudence of *A.*, might reasonably infer that the loss insured against had occurred, and that he also was bound to pay his proportion. It is plain, however, that such an inference would rest on the special and peculiar

Acts of strangers.

(*g*) This observation of course does not extend to any case where the mere fact of such a declaration having been made is in

itself material; any such declaration is of itself a fact.

(*h*) See Vol. II. tit. ADMISSIONS.

*Res inter
alios.*

circumstances of the case; and that, so far from warranting the general admission of such evidence by inference on a legal trial to ascertain the fact, it would supply no general rule, but must be regarded as an exception, even in the ordinary course of business.

In addition to this, it is obvious that whilst an individual might with discretion rely on the conduct of others, where, under the peculiar circumstances, there was no reason for suspicion (in which case a principle of self-interest would usually secure the exercise of a sound discretion), such inferences could not be safely left to a jury, who could not possibly be put in possession of all the collateral reasons by which an individual might properly be influenced in trusting to such evidence, and, which is more material, could not act on those collateral circumstances of suspicion which would have induced an individual to withhold his confidence.

An act done by another, from which any inference is to be drawn as to his knowledge of any bygone fact, is an acted declaration of the fact, and is not in general evidence of the fact, because there is no sufficient test for presuming either that he knew the fact, or that, knowing the fact, his conduct was so governed by that knowledge as to afford evidence of the fact which ought to be relied on. A man may frequently act upon very uncertain evidence of a fact; he may have been deceived by others; and even where he has certain knowledge, his conduct may frequently be governed by motives independent of the truth, or even in opposition to it.

Where a party professes to act on his knowledge of the truth of a particular fact, so that his so acting is accompanied by or is equivalent to a direct or express declaration of the truth of that fact, the question of admissibility falls under principles already considered. A test is necessary to show, first, that he had competent knowledge of the fact; secondly, that he faithfully communicated what he knew.

*Effect of
the rule.*

The rule, therefore, in the absence of special tests of truth, operates to the exclusion of all the acts or declarations or conduct of others, as evidence to bind a party, either directly or by inference; and, in general, no declaration or written entry, or even affidavit, made by a stranger, is evidence against any man (i). Neither can any one be affected, still less concluded, by any evi-

(i) For illustrations of this general principle, vide *infra*, tit. DEPOSITIONS—JUDGMENTS—EXAMINATIONS. In trespass against the sheriff and an execution creditor, for seizing goods of A., which the plaintiffs claimed as assignees under a joint

commission against A. and B., evidence of acts and declarations of B., for the purpose of showing that he had become bankrupt, is inadmissible. *Bernasconi & others v. Farebrother*, 1 B. & Ad. 372.

dence, decree or judgment, to which he was not actually or in consideration of law privy.

As this is a rule which rests on the clearest principles of reason and natural justice, it has ever been regarded as sacred and inviolable.

The importance of the principle, and the extent of its operation, make it desirable to ascertain its limits, by inquiring negatively what it does not exclude. Does not exclude:

In the first place, then, it is scarcely necessary to observe, that a man's own acts, conduct and declarations, where voluntary, are always admissible in evidence against him. The acts and admissions of a party.

As against himself, it is fair to presume that his words and actions correspond with the truth: it is his own fault if they do not. In many instances he is conclusively bound, more especially where he has formally engaged to be so bound; in others, his declarations or acts furnish mere *primâ facie* presumptions against him. The rule, therefore, above adverted to never excludes evidence of any acts or declarations made either by the party himself, or which he has authorized, or to which he has assented (j).

It is plain also that this principle does not exclude the operation of any general rule of law or custom; of these, and all their consequences, he is bound to take notice at his peril. Laws and customs

It follows, therefore, that even the acts and declarations of others are not excluded by this principle, whenever they have any legal operation which is material to the subject of inquiry; for legal consequences can no more be regarded as *res inter alios* than the law itself. For instance, where the contest is as to the right to a personal chattel, evidence is admissible, even against an owner who proves that he never sold the chattel, of a subsequent sale of the property in market overt; for although he was no party to the transaction, which took place entirely between others, yet as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios* than the law which gives effect to such a sale. So in actions against a sheriff, it very frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger; where the question is as to the right of ownership to particular property seized under an execution, all such transactions and acts between others are admissible in evidence, which in point of law are material to decide the right of property. Does not exclude facts which have a legal operation on the question.

So in all cases where any statute or law, or decree or judgment,

is of a public nature, or operates *in rem*; for to such proceedings all are privy.

Nor does the objection ever apply where the conduct or declaration of another operates not by way of admission or mere statement, but *as evidence*. Thus, if *A.* make a private memorandum of a fact in which *B.* has an interest, that memorandum, generally speaking, would not be evidence against *B.*; it would fall within the description of *res inter alios*; but if it were a memorandum of a fact peculiarly within the knowledge of *A.*, and made in the usual course of business, and especially if *A.* by that entry charged himself, it would be admissible in evidence after the death of *A.*; not that it operates against *B.* by way of admission of the fact, for if so it would be admissible whether *A.* were living or dead, but because, under those circumstances, the law considers the entry to be a proper medium for communicating the original fact to the jury, the testimony of *A.* himself being unattainable.

Effect of
the rule as
to declara-
tions, &c.

So the declarations of deceased persons, and evidence of reputation, in matters of public prescription, pedigree, and character, are admissible, not because strangers have any power to conclude a party by what they may choose wantonly to assert upon the subject, but because the law considers the evidence to be sufficiently deserving of credit, as a means of communicating the real fact, to be offered to a jury. And whenever that is the case, it is obvious that such declarations or reputation are no more *res inter alios* than if the declarants themselves had stated what they knew upon oath to the jury.

Declara-
tions ac-
company-
ing acts.

Why ad-
missible.

In the next place, although the general principle above announced excludes the declarations, writings, acts and conduct of strangers, as falling within the general description of *res inter alios acta*, the objection does not extend to a class of declarations already described as declarations accompanying an act; for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act: their connection with the act either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated.

Hence it is that declarations made by a trader at the time of his departure from his residence or place of business, are evidence of the intention with which he went. His real intention, in such a case, cannot be inferred otherwise than from external appearances, from his acts; and his declarations are collateral indications of the

nature of his acts and his intention in doing them (*k*). Upon the same principle, in *Lord George Gordon's Case*, the cries of the mob, at the time they were committing acts of violence, were held to be admissible evidence to show their intention (*l*). Such evidence is also admissible in actions against the hundred, in case of an action to recover the value of property feloniously demolished by persons riotously assembled. Declarations by a patient (*m*) to a medical attendant, as to his state of body and sufferings at the time, are evidence of the fact (*n*). Again, in order to prove that a husband had obliged his wife to leave his house by ill treatment, the declaration of the wife at the time of leaving the house was held to be admissible evidence against the husband to prove the fact. Here the fact itself of leaving the house was material and admissible, and the declaration accompanying the fact was collateral evidence of the nature of the act. The same principle applies, as will be seen, in actions for criminal conversation. There the terms on which the plaintiff and his wife lived previous to the adultery, being material to the inquiry, declarations by the wife in the absence of the husband, and letters written by her, not only to him but even to third persons, are admissible evidence to show the state of her mind and her affection for him (*o*).

Why admissible.

(*k*) See tit. BANKRUPT.

(*l*) 21 Howell's St. Tr. 542.

(*m*) 6 East, 188. It has been truly observed, that representations made by a party, as to his health and sensations, when made to a medical attendant, who has the opportunity of observing whether they correspond with the symptoms to which they refer, are entitled to greater weight than such as are made to an inexperienced person. Philipps on Evidence, 8th ed. Vol. i. p. 202, citing the observations made by the Attorney-general (Copley), in the *Gardiner Peerage Case*. In *Aveson v. Lord Kinnaird*, the rule is laid down as to patients without qualification. The admissibility of such evidence is in principle confined to representations made as to the state of the party at the time of making the representation, as contradistinguished from any statement of a particular fact occurring at any antecedent time. In the *Gardiner Peerage Case*, p. 79-136. 170, where it became material to inquire into the ordinary period of gestation, the medical witnesses were not permitted to state what had been said by women whom they had attended in confinement, as to the date of their conception.

(*n*) In the case of *Aveson v. Lord Kinnaird*, 6 East, 188, the plaintiff sued on a policy on the life of his late wife; he called a medical man as a witness, on whose certificate that the wife was in good health on a particular day, on which the policy had been effected, and who swore to his belief of the fact. He stated on cross-examination, that his opinion was formed principally from her answers given at the time. The defendant called a witness who had been an intimate friend of the wife, who having called upon her within a week after the day to which the certificate related, found her in bed, apparently ill, and the wife then related to her that she *had not been well* from a time previous to the day referred to in the certificate. The evidence was held to be admissible on two grounds: 1st, to show her own opinion as to the state of her health; 2dly, as also in contradiction of the evidence of the surgeon called by the plaintiff.

(*o*) See Vol. II. CRIMINAL CONVERSATION. See further on this subject, ENTRIES BY THIRD PERSONS, Vol. I.—RAPE, Vol. II. In the case of *The King v. Foster*, 6 Carr. & P. C. 325, it is said to have been held (by Gurney, B. and Park, J.),

Declarations, when part of the *res gestæ*, how proved.

It is, however, to be particularly observed, that in these cases, when declarations or entries (*p*) are admitted in evidence as part of the *res gestæ* or transaction, they are admitted, either because they constitute the very fact which is the subject of inquiry (*q*), or because they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences; and as such they are the best evidence, it may be, better than even the subsequent testimony of the party who made them, to prove the object for which they are admitted in evidence; for the party who made the declaration, if he were competent as a witness, would frequently be under a temptation to give a false colouring to the circumstance when its tendency was known; besides, as in this case the effect of the evidence is independent of the credit due to the party himself (*r*), it could be of no use to confirm his credit by examination upon oath, and his declaration as a mere fact is as capable of being proved by another witness as any other fact is.

A recital may be evidence for some purposes, although not for others.

It sometimes happens that a declaration is evidence for a particular purpose, although it is not to be taken as evidence to prove the truth of the fact declared; for the rule seems to be, that if the declaration be evidence as a circumstance in the cause, for any purpose, it is to be received; and the jury are to be directed not to consider it as in evidence for other purposes, for which, abstractedly, it could not have been received (*s*); as, for instance, where it is used as introductory of some other matter. Suppose the question to be, whether *A.* had wounded *B.*, if *C.* had asserted in the presence of *A.* that he had seen him wound *B.*, this would be admissible evidence, but only as introductory, and for the purpose of introducing and explaining *A.*'s conduct and behaviour when the charge was made, and his answer upon that occasion, and not as having any intrinsic tendency to prove the fact asserted.

that a declaration by one since deceased, immediately on receiving a fatal injury, as to the cause of the injury, was admissible. See Vol. II. tit. DEATH-BED DECLARATIONS.

(*p*) In future, to avoid repetition, the term declaration alone will be used; but it must be remembered, that the same principle applies to a written entry.

(*q*) See *Kent v. London*, 1 Camp. C. 177. For further illustrations of these principles, see tit. ENTRIES BY THIRD PERSONS. See also *Doe d. Tatham v. Wright*, 6 Nev. & M. 132; 4 Bing. N. S. 489; and 2 Nev. & P. 305.

(*r*) It may often happen that a declaration clearly false and incredible, is evidence of fraud in doing a particular act. As if a trader, meditating a long absence, were to represent to a creditor that he was going for a few miles only.

(*s*) In the case of *Vacher v. Cocks*, 6 M. & M. 353, Lord Tenterden allowed that part only of the letter to be read which contained the refusal. See further, tit. WRITTEN EVIDENCE; and *Willis v. Barnard*, 8 Bing. 376. *Whitehead v. Scott*, 1 M. & Nev. 2. *Whitaker v. Bank of England*, 6 C. & P. 708. *Fairlie v. Denton*, 2 C. & P. 603.

Collateral facts.

In the next place, it is observable that the principle is confined to those cases where an inference is attempted to be made from the acts, conduct or declarations of strangers, on the presumption that they would not have done such acts, or made such declarations, had not the fact so to be inferred been true; and that it is the want of any certain or known connection between such acts or declarations and the truth of the fact which occasions the exclusion. Hence it is that the principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.

Thus upon the trial of a prisoner on a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence, or property, either on the spot or elsewhere, in short, all visible *vestigia*, as part of the transaction, are admitted in evidence, for the purpose of connecting the prisoner with the act.

Such facts and circumstances have not improperly been termed inanimate witnesses. It may be asked, whether the same principle which excludes all inferences from the acts, conduct and declarations of others, ought not also to exclude such real circumstances; for an artful person may not only deceive by speaking and writing, but may also create false and deceptive appearances, calculated to induce others to draw false conclusions from them; he may act as well as speak a lie, and may deceive by false facts as well as false expressions (*t*). Real facts, that is, such as are the object of

(*t*) An ancient and celebrated argument supplies an illustration. A young man who was blind, a resident in his father's house, was charged by his stepmother with having assassinated his father by stabbing him whilst he slept. The evidence was circumstantial; and one of the prominent facts urged against the son was the circumstance that the walls of the apartments which separated the chamber of the father from that of the son were smeared with the impressions of bloody hands, proceeding from the chamber of the father to that of the son. With respect to such evidence, which according to the rules of our law would clearly be admissible, it may be objected, that such appearances may have resulted from the art and cunning of another, for the very purpose of implicating the accused;

and also it may be, as suggested in the case cited, for the further purpose of screening the real perpetrator of the offence.

Since, then, it is possible that such appearances may be the result of fraud and artifice, ought they to be admitted; or, at least, are they not subject to the same objection which is urged against the receiving evidence of the declarations or writings of others? The answer seems to be, that although a possibility exists that such appearances may have resulted from contrivance and design, yet that much less danger is to be apprehended from the reception of such evidence of actual facts than would result from receiving evidence of mere statements of facts.

In the case above supposed, two circumstances tended to show that the traces on

Collateral
circum-
stances.

actual observation, in contradistinction to mere recitals of facts, are in themselves always true, whilst a mere recital or statement may be wholly false ; and although collateral circumstances, when considered without careful comparison, may, either in consequence of contrivance and design, or even from accident, present appearances which tend to false conclusions, that tendency is always subject to be corrected by a multitude of other facts which are genuine.

The whole context of facts must be consistent with truth ; to speak more properly, they constitute the truth ; if all were known, nothing would be left for inquiry ; the greater the number known, the more probable will it be that an artificial or spurious fact, from inconsistency with the rest, will be detected, and the truth manifested.

This is the more evident, when it is considered that the practice of creating false appearances, must always be difficult, limited in its extent, and constantly subject to detection and exposure from a comparison of the deceptive fact with such as are undoubtedly genuine.

By way of illustration, the following instance may be selected : A person having been robbed and murdered, the body is so placed by the offender, with a discharged pistol beside it, as naturally to induce the inference that the deceased had fallen by his own hand ; but on close examination, it is discovered that the ball extracted from the body, and which occasioned death, is too large to have been discharged from that pistol, an inconsistency which immediately detects the imposture, and refutes the false inference to which *some* of the circumstances apparently tend.

The general admission, therefore, of evidence of the actual visible state of things, in the absence of any special reason for suspecting fraud, is quite consistent with the exclusion of statements or declarations, as contradistinguished from real facts ; such statements may be altogether fictitious, they are easily invented, and would therefore be the more dangerous, because if they were to be admitted to any credit, they would usually be conclusive.

At all events, there is a strong practical necessity for resorting, especially in criminal proceedings, to the aid of circumstantial evidence ; the consequences would be infinitely mischievous if such

the walls were the result of artifice and imposture. The accused being blind, night to him was the same as the day, and being familiar with the apartments, he wanted not the walls for his guidance. The im-

pressions on the walls were all equally clear and distinct ; had they been natural and genuine, they would have gradually become faint and indistinct.

evidence were to be excluded; and the real practical result from any suggestions as to the probability of fraud and deception being practised through the medium of such evidence, is, that it ought in all cases to be received and acted on with the highest degree of caution and circumspection. Collateral circumstances.

As the possession and enjoyment of disputed property are always indirect evidence of right, by reason of the obvious and natural presumption, when the right is in other respects doubtful, that such possession and enjoyment so acquiesced in had a lawful origin; so, acts of open delivery of possession, or written instruments by which a dominion over such property was exercised, and with which the possession and enjoyment correspond, are also presumptive evidence of right; for these are, in fact, not mere recitals of a fact, but are of themselves acts of dominion and ownership. Hence, when such instruments are so ancient that their connection with acts of enjoyment and dominion cannot be proved by the testimony of living witnesses, they are nevertheless admissible as the best and most proximate evidence to explain the origin and nature of such possession and enjoyment, where they can by other evidence be sufficiently connected with those facts. Possession; ancient instruments.

Hence it seems that to support any presumption or inference from such an instrument, first, its antiquity is essential; secondly, that it should have been found in the place or repository in which a true and genuine deed or writing of that kind would have been deposited (*u*); thirdly, that it should be free from all suspicion which may rebut the presumption raised in its favour (*x*); fourthly, in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it (*y*). Upon such a connection the force, if not the admissibility, of such evidence essentially depends. Declarations are, as has been seen, evidence as explanatory of the act which they accompany; and where long-continued enjoyment, and user of a right, has been proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and explanatory of it, may, under the same principle, be fairly admitted, as affording a presumption that it was a genuine instrument which has been used and acted on. And where proof of the actual execution and use of such instruments would have been evidence, then when such proof is absolutely excluded by lapse of time, the production of the deed, coupled with such cir- Essentials to such proof.

(*u*) Vide *infra*, PRIVATE WRITINGS—ANCIENT DEEDS.

(*x*) Ibid.

(*y*) Ibid.

Essentials
to such
proof.

cumstances as give it credit, appears to be the next best evidence which the case admits of, and when accompanied with proof of actual enjoyment, affords a strong presumption as to the existence of the right according to that deed. Hence ancient licenses on the court-rolls, granted by the lords of a manor, in consideration of certain rents, to fish in a particular river, are evidence to prove a prescriptive right of fishery in that river, without any proof of the rents being formerly paid, where it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other rights of ownership over the fishery (z). But it was held, that to give any weight to such evidence it was necessary to support it by evidence of payments, or of acts of ownership (a).

Where the question was, whether by the custom of a particular manor, a custom existed that after the turbary had been cleared away from a certain moss, the lord had a prescriptive right to hold the land cleared away, free from all right of common, it was held (in an action between a grantee of the land and one who claimed right of common in the *locus in quo*, in respect of an ancient messuage) that counterparts of old leases found among the muniments of the lord of the manor, by which such cleared portions of the moss had from time to time been granted by the lord, were admissible in evidence, although they were so old that no one could speak to possession under them. It was objected, both at the trial and on a motion for a new trial, that such evidence ought not to be admitted without proof of enjoyment under those leases. But the Court held that it was clear that such leases might be given in evidence; they only showed the existence of a fact, viz. that at the time of the dates of the leases the lord granted the land after the moss had been taken away (b).

Declara-
tions ad-
missible as
explanatory
evidence.

It is to be observed that oral or written declarations, although excluded as direct evidence of a fact, by the rules which govern the reception of such evidence, may still in many instances be used indirectly as explanatory of other evidence. Thus though a letter, stating particular facts, could not be read in evidence merely because it was so sent, yet if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer.

So letters and declarations, in themselves inadmissible, are ad-

(z) *Rogers and others v. Allen*, cor.
Heath, J. 1 Camp. 309.

(b) *Clarkson v. Woodhouse*, 5 T. R.
412.

(a) Per Heath, J. 1 Camp. 311.

missible if they communicate any fact to the party against whom they are read which either affects the rights in question or explains his subsequent conduct (c). Thus the proof of notice of the dishonour of a bill of exchange to a drawer or indorser is evidence, not of the fact of dishonour stated in the notice, but because such notice casts a legal liability on the party to whom it was given. So again, in an action on a policy of insurance, for a libel, keeping a mischievous animal, malicious prosecution, and indeed in any other case where the knowledge, motives or intentions of the parties were material, communications, whether oral or written, may be very important evidence, though not of the truth of the facts communicated, yet for judging as to the motives, intention and honesty of the party to whom the communication was made.

Declarations admissible as explanatory evidence.

Of the class of facts which require proof by means of indirect evidence, there are some of so peculiar a nature that juries cannot without other aid come to a correct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts, is admissible evidence to enable the jury to come to a correct conclusion. Thus the relation between a particular injury inflicted on a man's body and the death of that man, is an inference to be made by medical skill and experience, and may be proved by one who possesses those qualifications. So again, where the question is as to a general result from books or accounts of a voluminous nature, the general result from them may be proved by the testimony of one who has examined them.

On questions of skill.

Having thus noticed the great principles which affect the admissibility of evidence in reference to the main sources from which it is derived, whether it be in its nature direct, as derivable from original testimony, or indirect and collateral, as consisting in facts

Exclusion of secondary evidence.

(c) See further, as illustrative of this principle, *Cotton v. James*, 1 M. & M. 273. Letters received by a trader previous to his bankruptcy, were admitted in evidence to prove notice to the trader of a particular fact; *Vacher v. Cock*, 1 M. & M. 353, a letter received by a trader shortly before his bankruptcy, was received in evidence to prove the fact of refusal. In the case of *Taylor v. Williams*, 2 B. & Ad. 845, in an action for a malicious prosecution, the plaintiff having been taken before a ma-

gistrate, a letter written by a judge's clerk, and purporting to have been written by the authority of the judge, but without proof of that authority, was read to show the fact that the justice was induced by that letter to bail A. In the same case, an affidavit made by the clerk of the defendant's attorney was admitted, for the purpose of showing that those who conducted the prosecution had endeavoured to prevent a person from becoming bail for A.

Exclusion
of second-
ary evi-
dence.

and circumstances collateral to the principal subject of inquiry ; another rule, which operates to the exclusion of evidence, not generally, but on comparison with other and more satisfactory evidence, is next to be noticed. It is a general rule of evidence already adverted to, that evidence of an *inferior degree* shall not be admitted whilst evidence of a *higher* and more satisfactory degree is attainable. This rule, it will be seen, depends on a well-founded jealousy that the best evidence is withdrawn, and the inferior substituted, from a desire to suppress the truth. As this is a principle which affects the course and order of proofs, its application will be better considered hereafter, in conjunction with other rules applicable to the nature and modes of proof.

Exclusion
from
policy.

There are some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence ; on this account it is a general rule that the husband and wife cannot give evidence to affect each other, as it seems, either civilly or criminally. For to admit such evidence would occasion domestic dissension and discord ; it would compel a violation of that confidence which ought, from the nature of the relation, to be regarded as sacred ; and it would be arming each of the parties with the means of offence, which might be used for very dangerous purposes (*d*).

Husband
and wife.

Confiden-
tial com-
munication
to a bar-
rister, at-
torney, &c.

Upon the same principle, the law prohibits a barrister, solicitor or attorney, from divulging that which has been reposed in him confidentially by his client. This prohibition rests on very obvious principles of convenience and policy. It is absolutely essential to the ends of justice that the fullest confidence should prevail between a litigant and those who conduct his cause ; and it is equally clear that there would be an end of all such confidence, if the agent could be compelled to divulge all he knew. It is sufficient here, according to the plan originally proposed, to state this principle generally : its practical operation and effect, as to the relative situation of the parties when the communication was made, the nature, time and manner of the communication, will be discussed hereafter (*e*). It may be observed here, that this is the privilege, not of the counsel or attorney, but of the client ; and,

(*d*) Co. Litt. 6. b. See Vol. II. HUSBAND AND WIFE. The rule, it will be seen, does not extend to criminal charges founded on violence offered to the wife.

(*e*) See Vol. II. tit. CONFIDENTIAL COMMUNICATION.

therefore, that the former ought not to be allowed to divulge his client's secrets, even though he should be willing to do so.

Confidential communication to a barrister, attorney, &c.

The same principle evidently applies to the case of an interpreter between an attorney and his client.

Extent of the privilege.

Here, however, the law draws the line, and the principle of policy which, in the instances of husband and wife, and of attorney and client, forbids a violation of confidence, ceases to operate. The law will not permit any one to withhold from the information of the jury any communication which is important as evidence, however secret and confidential the nature of that communication may have been, although it may have been made to a physician or a surgeon, or even to a divine, in the course of discharging his professional duties; for it has even been held, that a minister is bound to disclose that which has been revealed to him as a matter of religious confession (*f*).

Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself. Of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors (*g*). It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances, to be put to the torture, for the purpose of extorting a confession (*h*).

Witness not bound to criminate himself.

There are also some instances in which particular evidence is excluded on grounds of policy, where the disclosure might be prejudicial to the community. Thus, in a state prosecution, a witness cannot be called upon to disclose the names of those to whom he has given information of practices against the State, whether such persons be magistrates, or concerned in the administration of government, or be merely the channel through which information is communicated to government (*i*). So it was held,

On grounds of state policy.

(*f*) *Peake, N. P. C. 77; Butler v. Moore, Macnall, 253; Vaillant v. Dodermead, 2 Atk. 524.*

(*g*) It is partly upon this principle that an examination of a prisoner, taken before a magistrate on oath, cannot be afterwards read against him as a confession. Another reason is, that the oath is extrajudicial.

(*h*) See Quintilian's *Inst. C. De Tormentis, Pan. lib. 48, s. 242.*

(*i*) *R. v. Watson, 2 Starkie's C. 135; and a note from Hardy's Case, by Abbott, J. ib. 136; and Lord Ellenborough's observations as to Stone's Case, ib. 137; 24 Howell's State Tr. 753. See also 32 Howell's State Tr. 100; a witness was not allowed to answer the question, whether he had delivered a short-hand note to an under secretary of state. See also De Berenger's Case, Gurney's Rep. 344.*

On grounds
of state
policy.

that an officer from the Tower of London could not be examined as to the accuracy of a plan of the Tower which was produced (*k*). Upon the same ground an official communication between the governor of a colony and the law officers there, relating to the state of the colony, cannot be disclosed (*l*). So it seems that the orders given by the governor of a foreign colony to a military officer acting under his command, ought not to be produced (*m*). The same objection applies to letters written by a secretary of state to a person acting under his authority (*n*); and, as it seems, to minutes taken before the privy council (*o*).

The principle does not exclude a communication which, although made to an official person, is not made in the discharge of any public duty (*p*).

Creation of
artificial
and con-
ventional
evidence.

Thus far the law controls the admission of ordinary evidence, by the application of excluding tests; it is next to be considered how far the law interferes to create evidence, or to add to its efficacy, by artificial means.

It is essential, in the first place, that the law should provide the means of preserving public statutes and ordinances, the decrees and judgment of its courts, and many other transactions of public interest, and for authenticating them as such when it should become necessary; and it is also essential to the convenience of individuals that the evidence of their mutual dealings and engagements should not be left to depend on the defective memories of living witnesses, but should be preserved by the aid of written memorials, mutually agreed upon, for the purpose of perpetuating those transactions. The law itself, therefore, provides authentic

(*k*) *R. v. Watson*, 2 Starkie's C. 148.

(*l*) *Wyatt v. Gore*, Holt's C. 299.

(*m*) *Cooke v. Maxwell*, 2 Starkie's C. 185. The document was there called for, in order to prove that the plaintiff's factory had been destroyed in consequence of orders from the defendant; and it was held, that although on principles of public convenience the document could not be read, the effect was the same as if the document had not existed, and that the witness might be asked whether what had been done had not been done by order of the defendant.

(*n*) 2 Starkie's C. 186.

(*o*) 6 St. Tr. 281, *Laver's Case*. Where the commander-in-chief directed the defendant, a major-general, with six other officers, to inquire into the conduct of a

plaintiff, and to report the opinion of the officers, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read. *Home v. Bentinck*, 2 B. & B. 130. So official communications between an agent of government and a secretary of state; *Anderson v. Sir W. Hamilton*, 2 B. & B. 150; are also privileged. For further observations on this subject, see tit. WITNESS—CONFIDENTIAL COMMUNICATION.

(*p*) *Blake v. Pilfield*, 1 M. & R. C. 198; which was the case of a letter written by a private person to the secretary of the postmaster-general, complaining of the conduct of the guard of a mail.

memorials of judicial proceedings, and of many other matters of a public nature, by means of its own officers specially delegated to the trust (q).

Of this description are the rolls of Parliament, public registers, and all records of courts of justice; and as these are made by ministers or officers specially authorized by the law, for the very purpose of perpetuating the facts which they contain, it is to be presumed that they are true memorials, and they are admissible evidence of those facts, though they are not sanctioned by the ordinary tests of truth. And it may further be observed, that as these memorials relate for the most part to matters of public concern and notoriety, the application of the ordinary tests is not so requisite as in ordinary cases. On this principle, even books of history are admissible to prove public and notorious historical facts. Records.

But though the law in such cases does not require the aid of the ordinary tests of truth, yet in these, as well as in all other instances, the *res inter alios acta* is always excluded. Many of the matters which the law records by instruments of its own creation are of a public nature, to which all may be considered privy; as in the case of public proclamations, acts of state, public registers of births and marriages. In the case of judicial records, although in one sense they are of public notoriety, and therefore, although such a record is always evidence of the mere fact that such a cause was litigated and such a judgment given, whenever the mere fact is material, yet they are not admissible evidence of the facts and rights *decided* by the decree or judgment, where they are of a private nature, unless as against one who was party or privy to the proceeding, nor usually, as will be seen, even then, unless he who offers the evidence was also a party or privy; in all other cases the objection, that the affair was *res inter alios acta* must prevail (r).

As the law creates instruments for the purpose of evidence, so it frequently annexes to them an artificial weight and consequence on grounds of legal policy.

Thus a record in a judicial proceeding is in many instances not simply admissible evidence, but conclusive as to the facts adjudged (s).

It is however very clear, that the previous verdict of a jury is not only inconclusive, but that in its own nature it cannot possibly Verdict.

(q) See tit. JUDGMENT—RECORD.

(s) See tit. JUDGMENT—RECORD.

(r) See tit. JUDGMENT.

Verdict.

be conclusive as to the truth of a fact which it professes to ascertain, where that fact is again disputed. It is possible that the former jury may not have been supplied with sufficient evidence to enable them to come to a correct conclusion, or that they may have fallen into error, or even that they have been swayed by indirect motives. But the law, on a strong principle of policy and convenience, and in order to exclude continual litigation, frequently annexes an artificial conclusive effect to a former verdict.

Conventional evidence.

Again, where formal instruments are prescribed or adopted by convention, for the purpose of manifesting and perpetuating the acts and transactions of private individuals, the law interferes not only in prescribing the manner and form, but also in giving an artificial effect to such instruments.

The ordinary instances in which the law prescribes the form and manner in which private persons shall express their acts and intentions, and record their engagements, are, in cases of wills of real property, grants of incorporeal rights, which must be evidenced by a specialty; agreements, which in many instances prescribed by the statute of frauds (*t*), must be evidenced by some written memorandum of the transaction. In these and other instances where the law prescribes the form, the evidence of the fact must of course consist in proof that the legal requisites have been complied with in the particular instance.

The admissibility of such conventional means of perpetuating the transactions between individuals, falls for the most part within the ordinary and natural rules of evidence. They are, in effect, formal admissions by the parties who make them, and as against themselves are therefore admissible. The admission of such evidence is quite consistent with the general rule which excludes all that is *res inter alios*; such evidence would therefore be *admissible* independently of any artificial rule of law, but when admitted, the law frequently annexes an artificial efficacy which such evidence would not otherwise possess (*u*).

The law not only in many instances prescribes the manner and form of the instrument by which such acts and intentions shall be signified, but frequently annexes an artificial and arbitrary effect to the evidence. Thus the law provides that a specialty, such as a bond, shall carry with it intrinsic and conclusive evidence that it was founded on a good and sufficient consideration, without any other proof; that a bill of exchange shall afford, not conclusive,

(*t*) See FRAUDS, STAT. OF.

(*u*) See tit. BOND—DEED—BILL OF EXCHANGE.

but *prima facie* evidence of consideration; whilst in other cases of mere parol engagements a consideration will not be presumed, but to give them effect must usually be alleged and proved. Conventional evidence.

The doctrine of estoppels by deed affords another prominent instance of the law's interference to annex an artificial effect to particular evidence. It is a general rule of law that a man shall be estopped or excluded from the averment or proof of that which is contrary to his admission by deed (*x*); but he is not estopped in the strict legal sense of the term by a mere oral admission, or even a written one not under seal. Independently of an artificial rule, there is no reason why a man should be estopped or excluded from asserting the truth in one case and not in the other. So also there are numerous instances where, on a just and equitable principle, the Courts hold a man to be concluded by his own conduct and representation of a fact, although contrary to the truth. If, for instance, a man induces a tradesman to supply a woman with goods by a representation that she is his wife, he will be concluded by that representation, and will not afterwards be admitted to show that she was not his wife (*y*). Estoppels.

In the next place, the law interferes by annexing to particular classes of evidence artificial presumptions, as contradistinguished from the natural inferences and presumptions which a jury would have made by virtue of their own knowledge and experience. Such presumptions are not rules for arriving at the simple truth; on the contrary, they are frequently used for the very purpose of Presumptions.

(*x*) See tit. DEED. In an original writ the defendant was described as *T. B. of C.* in the county of *N.*; upon a writ of error brought to reverse the outlawry, the errors assigned were, that *T. B.* was not before, or at the time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place of the name of *C.* in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as *T. B. of C.* in the county of *N.* Held, that this was an estoppel. *Bonner v. Wilkinson*, 6 B. & A. 682.

The rule that a party is estopped by his deed, does not hold where he is contracting for the benefit of the public; thus, as a trustee under a public turnpike act, or where to admit it would control a public statute. *Fairtitle*, ex. dem. *Mytton v. Gilbert*, 2 T. R. 169.

A. having obtained a patent as for a new invention, but which in fact had been discovered already, enters into an agreement, under seal, with *B.*, permitting him to use it in a particular manner. In an action on the agreement by *A.* against *B.* for using it in a different manner, *B.* is not estopped by his deed from disputing the novelty of the invention. *Hayne v. Maltby*, 3 T. R. 438.

(*y*) See Vol. II. tit. ADMISSIONS. Where a person assents to an act, and derives and enjoys a title under it, he cannot impeach it. *Rex v. Stacey*, 1 T. R. 4.

Where a copyholder has been admitted to a tenement, and done fealty to a lord of a manor, he is estopped, in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Nepean v. Budden*, 5 B. & A. 626.

Presump-
tions.

excluding the truth on grounds of special legal policy. Their object is to annex particular consequences to certain defined predicaments; in fact, therefore, they are in their operation mere rules of law.

For instance, the law raises a presumption of title on an undisputed possession of land for twenty years; but if from such a possession unanswered, title must be presumed, the result is precisely the same as if the law had said at once, that twenty years of adverse possession, unanswered, shall confer a title.

Such artificial presumptions are of two kinds; first, those which are made by the law, that is, by the Courts which administer the law, without the aid of a jury; secondly, such as cannot be made but by the aid of a jury. The former again consist of conclusive presumptions, which, like the presumptions *juris et de jure* of the civil law, admit of no proof to the contrary, or are simply *præsumptiones juris*, which may be rebutted in fact, or by some other presumption raised by the facts. Thus a deed under seal, where the execution of the instrument stands unimpeached, affords conclusive evidence of consideration (z).

But although the law will presume or intend, on proof of a fine, that it was levied with proclamations, or that the heir-at-law of one who died seised of an estate was in possession of that estate, yet these are but *primâ facie* presumptions, which may be repelled by actual proof to the contrary.

Other presumptions, again, which may be termed presumptions in law and fact, are those which are recognized and warranted by law as the proper inferences to be made by juries under particular circumstances; these, it will be seen, are founded on principles of policy and convenience, and not unfrequently on an analogy to express rules of law. Thus, in the instance above mentioned, a jury would be warranted in presuming, and even directed to presume a right, from evidence of an adverse and uninterrupted enjoyment of lands for twenty years, in analogy to the provisions of stat. 21 Jac. 1; although if the jury did not infer the right from such evidence, the Court could not do it.

(z) Vol. II. tit. PRESUMPTIONS.

OF THE INSTRUMENTS OF EVIDENCE.

HAVING thus considered generally the principles which regulate the admission of evidence, we are next to consider what are the means and instruments of evidence; how they are to be procured and used; their admissibility and effect. These are, first, oral witnesses, examined *vivâ voce* in court as to facts within their own knowledge, and in some particular instances, as to what they have heard; and secondly, written evidence.

Of the instruments of evidence.

And first, as to oral witnesses. Oral testimony, it is to be remarked, in natural order precedes written evidence. It is in general more proximate to the fact than written evidence, being a direct communication by one who possesses actual knowledge of the fact by his senses; whilst written evidence in itself requires proof, and must ultimately be derived from the same source with oral evidence, that is, from those who possessed actual knowledge of the facts.

Oral evidence, its natural priority.

Under this head may be considered,

- 1st. The mode of enforcing the attendance of a witness in civil and criminal cases, and his production of writings in his possession. The incidents to his attendance and default.
- 2dly. Objections in exclusion of his testimony.
- 3dly. The mode of examination in chief; cross-examination, and re-examination.
- 4thly. The mode of rebutting his testimony.
- 5thly. The mode of confirming his testimony.

1st. The mode of enforcing the attendance of a witness in civil and criminal cases, and also of enforcing his production of writings in his possession, and the incidents to his attendance or default.

1. His attendance upon the trial is enforced by *subpœna* or *habeas corpus*, in civil as well as criminal cases, and also in the latter by means of his recognizance.

The attendance of a witness in *civil* cases (a) is compelled

Compulsory process, &c.

(a) Commissioners of bankrupt had power to enforce the attendance of witnesses, under the stat. 1 Jac. 1, c. 15, s. 10; and by the 40 Geo. 3, c. 121, s. 13, bankrupts in execution are to be brought before them. And now see the stat. 6 Geo. 4, c. 16. Under the stat. 1 Jac. 1, c. 15, it was not necessary, upon summoning

Compul-
sory pro-
cess on
witness not
in custody.

(where the witness is not in custody) by means of a subpoena, which is a judicial writ, commanding the witness to appear at the trial to testify for the plaintiff or defendant, under pain of forfeiting 100*l.* in case of disobedience(*b*). One writ cannot contain the names of more than four witnesses(*c*), and must be renewed at every subsequent assizes or sitting, if the cause be made a *remanet* (*d*). But although the subpoena contain more than four witnesses, a witness who is served with a subpoena-ticket in court cannot refuse to give evidence(*e*). A subpoena-ticket, which is a copy of the writ(*f*), should be made out for each witness, and must be served upon him personally(*g*), a reasonable time before the day of trial(*h*). Notice in London, at two in the afternoon, calling upon the witness to attend at the sittings at Westminster the same day, is too short(*i*).

Expenses
of witness.

The service of a ticket is sufficient(*k*), but the original should be shown to the witness when the ticket is delivered to him. It is also requisite, in civil cases, to tender to the witness his reasonable expenses, not only of going to attend the trial, but also of his return; for although he may refuse to be sworn till such expenses be paid, the party may not choose to call him, and he may find it difficult to get home again(*l*). Where the witness lives within the bills of mortality, it is usual to deliver a shilling with the subpoena-ticket for his attendance in London or at Westminster(*m*). In other cases the sum tendered should be proportioned to the circumstances. Where an attachment is moved for,

a witness to attend before commissioners of bankrupts, that his expenses should have been tendered (*Battie v. Gressley*, 8 East, 319); and therefore a warrant issued by the commissioners on account of the non-attendance of a witness without lawful impediment, and authorising his arrest, was legal, and proof of excuse lay on the party arrested. *Ib*.

(*b*) See the form Tidd's P. App. c. 35, s. 16. The stat. 5 Eliz. c. 9, s. 12, gives an additional remedy of 10*l.* to the party grieved. A subpoena to bring a party into contempt for non-attendance, must have inserted in the body of it the place where the cause is intended to be tried, if at the sittings in London or Middlesex. *Milson v. Day*, 3 M. & P. 333.

(*c*) Cowp. 846.

(*d*) *Sydenham v. Rand*, T. 24 Geo. 3; Tidd, 723, 3d ed.; *Gillett v. Mawman*, T. 47 Geo. 3. C. P.

(*e*) Cowp. 846.

(*f*) It is sufficient if the subpoena-ticket contain the substance of the writ. 5 Mod. 355; Cro. Car. 540.

(*g*) To warrant an attachment, *quare*, whether personal service be necessary in the case of an action. *Smalt v. Whitmill*, Str. 1054; *Wakefield's Case*, Cas. Tem. Hardw. 313.

(*h*) 1 Str. 510; 2 Str. 1054.

(*i*) *Hammond v. Stewart*, Str. 510.

(*k*) *Goodwin v. West*, Cro. Car. 522. 540; *Maddison v. Shore*, 5 Mod. 355.

(*l*) *Chapman v. Pointon*, 2 Str. 1150; *Fuller v. Prentice*, 1 H. B. 49; *Hallett v. Mears*, 13 East, 15; *Ex parte Roscoe*, 6 Meriv. 191. The obligation depends on the stat. 5 Eliz. c. 9.

(*m*) 2 Str. 1054; Tidd's Pr. 848; 3 Bl. Com. 369.

the Court will not enter into any nice calculation as to the expense, but will consider whether the non-attendance originated in obstinacy or not (*n*). If a feme covert be subpœnaed, the tender should be to her, and not to her husband (*o*). In an action under the statute of Elizabeth, it has been held, that the payment of a shilling, with a promise to pay the witness all further reasonable charges upon his appearance, which the witness accepted, was sufficient (*p*). The case of a witness *bonâ fide* brought over from a foreign country, does not differ in principle from a witness resident in this country; and the expenses in each case of his going to and from the place of trial, and of his residence, are allowed on taxation of costs (*q*).

Expenses
of witness.

A witness is not in general entitled to remuneration for loss of time (*r*).

A witness in a civil case may maintain an action for his expenses, although he has refused to give evidence at the trial because they have not been paid (*s*), or, as it seems, although the cause has not been called on (*t*); but he cannot recover for loss of time even upon an express *assumpsit* (*u*).

A witness who has been summoned before commissioners of a bankrupt may recover the expenses allowed by the commissioners, although he was a creditor, and the allowance was by parol (*x*).

(*n*) *Chapman v. Pointon*, Str. 1150.

(*o*) Cro. Eliz. 122; Jon. 430. At all events, it is safer to make the tender to the wife than to the husband.

(*p*) Cro. Car. 522.540; March, 18. So where the witness having received a guinea with a subpœna, on the defendant's side, consented to take 1*s.* with the plaintiff's subpœna, it was held to be sufficient in an action for not obeying the plaintiff's subpœna. *Betteley v. M^cLeod*, 3 Bing. N. C. 305.

(*q*) *Tremaine v. Faith*, 1 Marsh, 563; 6 Taunt. 88; 4 Taunt. 55. 699.

(*r*) *Moore v. Adam*, 5 Maule & S. 156; and *Lowry v. Doubleday*, there cited; *Willis v. Peckham*, 1 B. & B. 515; *Severn v. Olive*, 3 B. & B. 72. In some instances, however, such expenses have been allowed to attornies and medical practitioners; 5 M. & S. 159. But see *Collins v. Godefroy*, 1 B. & Ad. 950. Where a foreign witness would not attend without being paid for loss of time, the costs were allowed; *Loneragan v. Royal Exchange Assurance*

Company, 7 Bing. 729; though detained pending an injunction; ib. 13.

(*s*) *Hallett v. Mears*, 13 East, 15.

(*t*) *Barrow v. Humphries*, 3 B. & A. 598, doubting *Bland v. Swafford*, Peake's C. 60. See *Hallett v. Mears*, 13 East, 15.

(*u*) *Willis v. Peckham*, 1 B. & B. 515. In the late case of *Collins v. Godefroy*, 1 B. & Ad. 950, it was held that an attorney, who attended on a subpœna, could maintain no action for compensation for loss of time; and an express promise to remunerate would make no difference, for it would be without a consideration to support it. But expenses of subsistence to a seafaring man, though an Englishman, have been allowed. *Berry v. Pratt*, 1 B. & C. 276. The expenses of making scientific experiments, with a view to evidence, are not allowable. *Severn v. Olive*. 3 B. & B. 72.

(*x*) *Yarker v. Botham*, 1 Esp. C. 65; under the stat. 1 Jac. 1, c. 15, s. 10.

Expenses
of witness.

The summary remedy given to witnesses by the stat. 53 Geo. 3, is not limited to witnesses summoned for the petitioner, but extends to costs and expenses becoming due from the sitting Member as well as the petitioner. The certificate of the Speaker is conclusive as to the proof of the witness having been summoned (y).

Conse-
quence
of disobe-
dience.

If a witness wilfully neglect to attend upon the subpœna, he is guilty of a contempt of Court, for which he is liable to an attachment (z). He is also liable to damages at common law, in an action on the case by the party injured (a); and lastly, by the stat. 5 Eliz. c. 9, s. 12, he shall forfeit for such offence 10 l., and yield such further recompense to the party grieved as, by the discretion of the Court out of which the process shall issue, shall be awarded (b). The most usual mode of proceeding is by attachment, in which case an affidavit of personal service is necessary, and of the payment or tender of reasonable expenses (c).

(y) *Magreave v. White*, 8 B. & C. 412.
(z) 1 Str. 510; 2 Str. 810. 1054. 1150;
Cowp. 386; Doug. 561.

(a) Doug. 561. It has been said that no action lies unless the cause were called upon, and the jury sworn; *Bland v. Swafford*, Peake's C. 60; but *qu.* and see the observations of the Court in the case of *Barrow v. Humphries*, 3 B. & A. 598.

(b) In an action to recover the ten pounds, the plaintiff must set forth special damages; Cro. Car. 522. 540; *Goodwin v. West*, Jon. 430; 5 Mod. 355; for unless there be a party grieved there is no cause of forfeiture. *Aliter*, Cro. Eliz. 130; Leon. 122. An action will not lie for further recompense unless it has been assessed by the Court out of which the process issues; neither the Judge nor the jury at Nisi Prius are competent to do it. *Pearson v. Iles*, Doug. 566.

(c) *Chapman v. Pointon*, 2 Str. 1150. It seems that an attachment will be granted by the Court of C.P. as well as by the Court of K. B.; but that the practice was formerly confined to the Court of K. B. See Str. 1150; Barnes, 33. 497; 1 d. Raym. 1528; 1 H. B. 49; 5 Taunt. 260. The Court will not grant an attachment unless a clear case of contempt be made out, and everything has been done which was necessary to call for his attend-

ance. *Garden v. Cresswell*, 2 M. & W. 319. An attachment has been refused where the whole of the expenses of the journey, and of the necessary stay at the place of trial, were not tendered at the time of serving the subpœna (*Fuller v. Prentice*, 1 H. B. 49). So where, the witness living at the distance of thirty-four miles from the assize town, the expenses were not tendered to him till the evening before the trial (*Horne v. Smith*, 6 Taunt. 9). So where the witness, in the course of the third day's attendance, left the court to attend to urgent business of his trade, although the consequence was a nonsuit; no notice having been given him, when the subpœna was served, when the trial would come on (*Blandford v. De Tastet*, 5 Taunt. 260); even although the witness was induced to leave court by the representations of the defendant's attorney.

A witness is guilty of a contempt of Court in not attending at the assizes under a subpœna, although the jury have not been sworn. *Mullet v. Hunt*, 1 Cr. & M. 752; and even although cause be not called on. *Barrow v. Humphries*, 3 B. & A. 598, P. C. doubting the case of *Bland v. Swafford*, Peake's C. 60. If it appear from the notes of the Judge upon the trial, or by affidavit, that the testimony of the witness could not have been material, an attachment will not be

Where the witness is in custody, his testimony is obtained by means of a *habeas corpus ad testificandum*, which was grantable at the discretion of the Courts at common law (*d*): and by the stat. 44 Geo. 3, c. 102, any Judge of the Courts of King's Bench and Common Pleas in England or Ireland, or any Baron of the Court of Exchequer of the degree of the coif in England, or any Baron of the Court of Exchequer in Ireland, or any Justice of Oyer and Terminer, or gaol delivery, being such Judge or Baron, may at his discretion award a writ or writs of habeas corpus for bringing up any prisoner or prisoners detained in any gaol or prison, before any of the said Courts, or any sitting of Nisi Prius, or before any other court of record in the said parts of the said United Kingdom, to be examined as a witness, &c. in any cause or causes, matter or matters, civil or criminal, depending or to be inquired into or determined in any of the said courts (*e*).

Where witness is in custody.

An application for such writ, either to the Court or to a Judge (*f*), must be accompanied by an affidavit of the applicant, stating that the witness is a material one (*g*); and if he be at a great distance, the affidavit should further show the materiality (*h*). It is said (*i*) that the affidavit should also state that the witness is willing to attend; and this appears to be necessary where the witness is not a prisoner, as in the case of a seaman on board a

granted. *Dicas v. Lawson*, 1 Cr. M. & R. 934. Where the attorney, not expecting the cause to be called on, gave the witness leave to depart until the next day, and in the meantime the cause was called on, an attachment was refused. *Furrah v. Keate*, 6 Dowl. 470. The affidavit should state that the writ was shown to the witness at the time of service. *Garden v. Cresswell*, 2 Mee. & W. 319.

The affidavit to found an attachment in the P. C. must state that the witness was duly called at the trial. *Malcolm v. Kay*, 3 Moore, 222. It seems that the name of the witness, inserted in the copy of the subpoena at the time of service, may be inserted in the original writ of subpoena when the witness is called. *Wakefield v. Gall*, Holt's C. 526, cor. Gibbs, C. J.

(*d*) See Tidd's Pr. 858; *Ex parte Tillotson*, 1 Starkie's C. 470. The Court of Common Pleas refused to grant an order to commit a prisoner to the custody of the warden of the Fleet, who had been charged in custody of the sheriff upon an extent,

and brought up on a habeas corpus for the purpose of being examined as a witness in a civil suit. *Leigh v. Sherry*, 2 Moore, 33.

(*e*) Previous to this statute it was the usual practice for the Courts to award this writ upon motion, accompanied with a proper affidavit. By the stat. 43 G. 3, c. 140, a Judge of any of the courts at Westminster may at his discretion award a writ of habeas corpus for bringing a prisoner detained in any gaol in England before a court-martial, or before commissioners of bankrupt, commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant.

(*f*) The application ought, it seems, to be made to a Judge at chambers. *Gordon's Case*, 2 M. & S. 582.

(*g*) Cowp. 672; Peake's Ev. 192, 3, 4th ed.; Fortescue, 396; 4 State Tr. 600 *Tinley v. Porter*, 5 Dowl. 744.

(*h*) Tidd's Pr. 4th ed. 724.

(*i*) Peake's Ev. 201; Tidd's Pr. 724.

man of war, for he cannot be brought up as a prisoner without his consent (*k*); and therefore in such case it should appear that the witness has been served with a subpoena, and is willing to attend (*l*).

When
granted.

This writ will not be granted to bring up the body of a prisoner of war (*m*); and he cannot be brought up without an order from the Secretary of State; and the writ was refused where it appeared to be a mere contrivance in order to remove a prisoner in execution (*n*). If the Court make a rule, or the Judge grant his fiat, the writ is sued out, signed and sealed, and is left with the sheriff, or other officer in whose custody the witness is, who will bring him up on being paid his reasonable charges (*o*). When the attendance of a material witness cannot be procured, either in a civil or criminal proceeding, the usual course is, either to move to put off the trial (*p*), or to examine him upon interrogatories (*q*).

In criminal
cases, wit-
nesses for
the prose-
cution.

The compulsory process in criminal cases is, *first*, by means of a subpoena issued in the King's name by the Justices of the court in which the offence is to be tried (*r*); the more usual course is, *secondly*, for the justices or coroners who take the informations, examinations and depositions, to bind the witnesses under the statute of 7 G. 4, c. 64, s. 2, by recognizance, to appear at the next gaol delivery or quarter sessions to give evidence (*s*). The justices (*t*) may take these recognizances at any time before the

(*k*) *Rex v. Rodham*, Cowp. 672.

(*l*) *Ib.*; but this seems to be unnecessary where the party is an actual prisoner; for there is no reason why he should not be compelled to attend as well as a person who is at large, or for allowing him, because he is a prisoner, to deprive a party of the benefit of his testimony.

(*m*) *Farley v. Newnham*, Doug. 419; 6 T. R. 497; 7 T. R. 745.

(*n*) 3 Burr. 1440.

(*o*) Tidd, 726; 1 Crompt. 248. *Qu.* whether the officer may require an indemnity? He would be liable for an escape if he brought up a prisoner in execution for debt without such a writ. *R. v. Eliz. Cellier*, 3 St. Tr. 97; *R. v. Sir John Friend*, 4 St. Tr. 599.

(*p*) See below, tit. TRIAL.

(*q*) Vid. *infra*, DEPOSITIONS.

(*r*) *R. v. Ring*, 8 T. R. 585; see *ib.* as to the form of the affidavit in moving for an attachment. Where the witness resides beyond the jurisdiction of the court,

a subpoena may be issued from the crown-office; *ib.* Disobedience of a subpoena issued by the court of quarter sessions is not a ground of attachment for a contempt. *R. v. Brownell*, 1 Ad. & E. 602.

(*s*) 2 St. Tr. 580; 4 St. Tr. 37; Dalt, J. 111; 4 Comm. 359; 2 Haw. c. 46, s. 17.

(*t*) Magistrates cannot in general enforce the attendance of witnesses except in cases of felony, where a prisoner is brought before them on suspicion of felony; for in such cases the stat. 2 & 3 of Ph. & M. c. 10, (and now the st. 7 G. 4, c. 64, s. 2), which requires them to take the examinations of those who bring the prisoner, incidentally gives them a power to examine witnesses upon oath, and to enforce the attendance of material witnesses. *Bennett v. Watson*, 3 M. & S. 1; Dalt, J. c. 6; Lamb. 517; 12 Rep. 131. See the stat. 15 Geo. 3, c. 39.

By particular statutes courts of various jurisdictions have power given them to

trial; and if the witness refuse to enter into such recognizance, the justice or coroner may commit him, or bind him to his good behaviour, and to appear at the next gaol delivery or quarter sessions of the peace (*u*). Where a feme covert, having given evidence before a magistrate in a case of felony, refuses to attend at the trial, or to find sureties, the justice may commit her (*x*). If the witness cannot find sureties, the justice ought to take his own recognizance; it would in such case be illegal to commit the witness (*y*). In proceedings before the justices of the peace at their quarter sessions, whose jurisdiction does not extend beyond the county for which they act, in order to procure the attendance of a witness who resides in another county, the process is issued from the crown-office (*z*). Where an offender who has escaped from one part of the United Kingdom is tried in another, under the stat. 13 Geo. 3, c. 31, and 44 Geo. 3, c. 92, and in general by virtue of the stat. 45 Geo. 3, c. 92, s. 3, service of a subpoena on a witness in one part of the United Kingdom to give evidence in a criminal prosecution in another part, is as effectual as if the witness had been served with the subpoena in that part of the United Kingdom where he is required to appear, and upon default, notified by a certificate under the seal of the court whence the subpoena issued, to the Court of King's Bench in England or Ireland respectively, or of the High Court of Justiciary in Scotland, he is liable to be punished as for a contempt of the process of those courts respectively. By the express provision of the latter statute (sec. 4), the witness cannot be punished for a default, unless the reasonable expenses of coming and attending to give evidence, and of returning, have been tendered to him (*a*). In other cases the witness is bound to obey the writ, or to perform the condition of his recognizance, although no expenses have been tendered to him (*b*); for the calls of justice are paramount to all

In criminal cases.

enforce the attendance of witnesses. Commissioners of bankrupt, by the stat. 1 Jac. 1, c. 15, s. 10, and see the stat. 5 G. 2, c. 30, s. 6, and 49 G. 3, c. 121, s. 13, and the late st. 6 G. 4, c. 16, s. 33, *infra*, 86. Courts martial, by the stat. 55 G. 3, c. 108, s. 28. Commissioners of inclosure, by stat. 41 G. 3, c. 109, s. 33, 34.

(*u*) 2 Hale, P. C. 52. 282; Dalt, J. 111; *Bennett v. Watson*, 3 M. & S. 1; Haw. b. 2, c. 8, s. 58, and c. 16, s. 2.

(*x*) *Bennett v. Watson*, 3 M. & S. 1.

(*y*) Per Graham, B. Bodmin Summer Assizes, 1827.

(*z*) See *R. v. Ring*, 8 T. R. 585.

(*a*) The provision is confined to cases where the witness making default is out of the jurisdiction of the court to which the certificate is transmitted. *R. v. Brownell*, 1 Ad. & Ell. 602; and it does not apply to a subpoena from the quarter sessions. *Ib*.

(*b*) 2 St. Tr. 124; *Rex v. Love*, 1 Burn's J. 533.

In criminal
cases.

private considerations and claims(c). In cases of felony, the Legislature has made provision for the expenses of the prosecution and witnesses (d).

(c) Hawk. b. 2, c. 46, s. 173; 2 Hale, 282. *R. v. Cooke*, 1 Carr. & P. 321; and see a MS. case to the same effect cited in Burn's J. by *D'Oyly & Williams*, vol. 1, p. 1076. In the former of these cases the witness was called by the defendant. It is the common practice in criminal cases for the Court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid. Some doubt has been expressed on the subject (*Chitty's Crim. Law*, vol. 1, 612), on account of the provision for payment of expenses by the stat. 45 G. 3, c. 92, s. 3. It seems, however, to be without foundation: if, in general, a witness were entitled to his expenses in a criminal as well as in a civil case, the clause in that statute for payment of such expenses would have been unnecessary. A witness subpoenaed to give evidence in a different part of the United Kingdom, would usually be placed under greater difficulty, and subject to a greater expense, than in ordinary cases.

(d) The stat. 18 Geo. 3, c. 19, s. 8, has directed, that where any person shall appear, on recognizance or subpoena, to give evidence as to any grand or petit larceny, or other felony, whether any bill of indictment be preferred or not, to the grand jury, it shall be in the power of the court, provided the person shall, in the opinion of the court, have *bonâ fide* attended in obedience to such recognizance or subpoena, to order the treasurer of the county, &c. to pay him such sum as to the court shall seem reasonable, not exceeding the expenses which it shall appear to the court the said person was *bonâ fide* put unto by

reason of such recognizance and subpoena making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time. See also the statutes 25 Geo. 2, c. 36; 27 Geo. 2, c. 3, s. 3. The latter of these statutes extends to those cases only where the witness was bound by recognizance to appear. These statutes are confined to cases of felony. *R. v. Justices of the West Riding of Yorkshire*, 7 T. R. 377.

By the statute 58 Geo. 3, c. 70, s. 4, the court before which any person is prosecuted or tried for any grand or petit larceny or other felony, may order the sheriff or treasurer of the county to pay to the prosecutor, or any other person who shall be bound to prosecute or give evidence, &c. or who shall be subpoenaed to give evidence, and who shall appear to give evidence, or who shall appear to the said court to have been active in the apprehension of any person or persons accused of any of the offences specified in the several Acts recited in the statute,* as well the costs, charges and expenses which the prosecutor shall be put to in preferring the indictment or indictments against the person or persons so accused as also such sum and sums of money as to the said court shall seem reasonable, to reimburse such prosecutor and witnesses, person or persons, so concerned in such apprehensions as aforesaid, for the expenses they shall have been severally put to in attending before the grand jury to prefer such indictment or indictments, and in otherwise carrying on such prosecution; and also to compensate such prosecutor and witnesses, and person or persons, in such apprehension as aforesaid, respectively,

* The recited Acts are 4 W. & M. c. 8, relating to highway robberies; 6 & 7 W. 3, c. 17, relating to the counterfeiting of coin; 10 & 11 W. 3, c. 23, to burglaries, house-breaking, robbing in shops, &c.; 5 Ann. c. 31, to house-breakers; 14 Geo. 2, c. 6, to the stealing and destroying sheep and other cattle; and 15 Geo. 2, c. 18, to the uttering of counterfeit coin.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses on his behalf without a

Witness for
defendant
in criminal
cases.

tively, for their loss of time and trouble in such apprehension and prosecution as aforesaid.

By sec. 8, no person shall be entitled to any such costs or expenses for attending the court, unless he shall have been bound by recognizance, or have previously received a subpoena to attend, or a written notice for that purpose from the prosecutor, his agent, or attorney.

By the stat. 7 Geo. 4, c. 64, it is enacted, that the court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as the court shall deem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates or grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, and also to compensate such person for trouble and loss of time; and the amount of the expenses for attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time

therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned.

Sec. 23. That where any prosecutor or other person shall appear before any court on recognizance or subpoena to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have *bonâ fide* attended the Court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.

On an indictment for a felony, removed by *certiorari* and tried at Nisi

For defendants.

special order from the Court; and if they attended voluntarily, they could not be sworn (*e*). But in cases of misdemeanor a defendant might always take out subpoenas as of course (*f*). By the statute 7 Will. 3, c. 3, s. 7, it was provided, that defendants, in case of treason, should have the same process to compel the attendance of witnesses for them as was granted to compel witnesses to appear against them; and ever since the statute 1 Ann. 2, c. 9, s. 3, which provides that witnesses for the prisoner, in cases of treason or felony, shall be sworn in the same manner as the witnesses for the Crown, and be subject to the same punishment for perjury, the process by subpoena is allowed to defendants in cases of felony, as well as in other instances (*g*); and consequently, as the law now stands, a witness who refused, after being subpoenaed to attend, to give evidence for a defendant in a criminal case, would be liable to an attachment for a contempt of court (*h*).

In bankruptcy.

By the stat. 6 Geo. 4, c. 16, s. 33, commissioners of bankrupt may summon before them any persons whom they believe to be capable of affording information concerning the trade, dealings or estate of the bankrupt, and in default they may order the party summoned to be apprehended. Every such witness is entitled to have his expenses tendered him (*i*).

Where magistrates are authorised by a statute to hear and determine, or to examine witnesses, they have, incidentally, authority to summon witnesses, and take the examination on oath (*k*).

In the case of a reference to arbitration by rule of Court, or by a Judge's order or agreement to make the submission a rule of Court, the Court making such rule or order, or any Judge, may direct the attendance of a witness to be examined before the arbitrator on the production of any document, by the statute 3 & 4 Will. 4, c. 42, s. 11.

Commissioners of inclosure, under the statute 41 Geo. 3, c. 109, ss. 33, 34, have power to summon in writing any person within a certain distance to appear before them to be examined, and if the party summoned refuse to appear, he will be liable to a penalty.

Prisus, neither the Court nor the judge who tried it has power to award costs to the prosecutor, under the above Statute. *Rex v. Exeter Co. Treas.* 5 M. & Ry. 167. By the statute 1 Vict. c. 44, the power to grant costs is extended to the case of a misdemeanor in concealing the birth of a child. By the statute 6 & 7 Will. 4, c. 89, and 1 Vict. c. 68, provision is made for the expenses of medical and other witnesses attending on coroners' inquests.

(*e*) 2 Haw. c. 46, s. 170; *Rex v. Turner*, 2 State Tr. 505; 1 State Tr. 969; 3 State Tr. 1002.

(*f*) 2 Haw. c. 46, s. 170; 1 State Tr. 969; 2 State Tr. 238. 252. 450.

(*g*) 2 Haw. c. 46, s. 172.

(*h*) Even, as it seems, although his expenses had not been paid or tendered, vide *supra*, 83.

(*i*) 6 G. 4, c. 16, s. 35.

(*k*) Lamb, 517; Dalton's, J. c. 6.

Witnesses also being duly summoned to attend on Courts Martial, are, by the statute 55 Geo. 3, c. 108, s. 28, liable, on neglect to attend, to attachment in the Court of King's Bench, as in case of neglect to attend a trial on a criminal proceeding in that Court.

Where either party cannot safely proceed to trial on account of the absence of a material witness, the proper course is to move the Court in term time, or to apply to a Judge in vacation, or to the Judge at the sittings, on a proper affidavit, to put off the trial (*l*).

Proceeding where the witness cannot be procured.

Where a witness is resident abroad, or is going abroad, the proper course is to apply to the Court to have him examined on interrogatories (*m*).

Where an instrument is in the hands of a third person, the production is compelled by means of a writ of *subpœna duces tecum* (*n*).

Subpœna duces tecum.

By this writ the witness is compellable, it seems, to produce all documents in his possession, unless he have a lawful or reasonable excuse to the contrary (*o*). Of the validity of the excuse

(*l*) This is granted by the Court where it appears that injustice would be done by refusing the application, and that the party who applies has conducted himself fairly. In some instances it has been refused even to a defendant, where it appeared that he intended to set up a defence which, though legal, is not favoured, as that the plaintiff is an alien (*Robinson v. Smyth*, 1 B. & P. 454); or even to give the defendant an opportunity which he has lost by his neglect of applying to a court of equity for a commission (*Calliard v. Vaughan*, 1 B. & P. 212); so, in general, where the applicant has been guilty of improper delay (*Saunders v. Pitman*, 1 B. & P. 53). Such a rule will not be granted to a defendant after pleading a sham plea, unless he will pay the money into court. *Tidd's Pr.* 831.

An application to put off the trial to a future sittings will not be granted at the instance of the plaintiff, because he may withdraw his record; but when, in consequence of some sudden indisposition or accident, a witness is unable to attend, but is likely to be able to do so before the sittings are over, the Judge will usually make an order that the cause shall stand over. *Anslay v. Birch*, 3 Camp. C. 333.

In the Court of Common Pleas a trial

cannot be put off by consent of the defendant, the plaintiff must either proceed to trial or withdraw the record. 2 Taunt. 221.

Where a defendant makes the application at *Nisi Prius*, the course is to give notice to the plaintiff's attorney, with a copy of the affidavit, which, where the defendant is abroad or out of the way, may be made by his attorney or a third person. *Peake's C.* 97. The affidavit should state that the person is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured to procure him to be subpœnaed, and expects to procure his future attendance. See *Tidd's App.* 312.

(*m*) *Infra*, WRITTEN EVIDENCE.—Index, tit. EXAMINATION ON INTERROGATORIES.

(*n*) From the entries cited in the case of *Amey v. Long* (9 East, 473), it appears that this writ has in fact been used from the time of Charles the Second; but so necessary is the power of compelling the production of documents in the possession of third persons, that the means of doing it must have been coeval with the courts of law. See Appendix.

(*o*) *Amey v. Long* (9 East, 473), where it was held that an action lay against

Subpœna
duces
tecum.

the Court, and not the witness, is to judge (*p*). As every man is, in furtherance of justice, bound to disclose all the facts within his knowledge which do not tend to his crimination, upon the very same principle he is also bound to produce such documents as are essential to the discovery of truth and the great ends of justice. But as he is protected from answering questions, the answers to which may subject him to penal responsibility, so he is not compellable to produce any document in his possession, where the production would be attended with similar consequences (*q*).

There seems, however, in one respect, to be a distinction between the compelling a witness to answer a question orally, and the obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but it seems that he is not compellable to produce title-deeds, or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds or other private documents (*r*).

a sheriff's bailiff for not producing a warrant under which he acted in obedience to a writ of subpœna in a former action, in consequence of which the plaintiff was nonsuited; and it was held that his ability to produce the warrant, and his want of just excuse for not producing it, are sufficiently alleged by stating that he could and might, in obedience to the said writ of subpœna, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary. An attorney in possession of a deed to which he is an attesting witness, and on which he has a lien, will not be compelled by the Court to produce it; the mode of proceeding is by *subpœna duces tecum*, as in any other case. *Bushe v. Lewis*, 6 Mad. 29.

Where three or four defendants have suffered judgment by default, one of the three may be subpoenaed to produce a deed. *Colles v. Smith*, 4 Bing. N. S. 285; 6 Dowl. 239.

(*p*) *Amey v. Long*, 9 East, 473. *Field v. Beaumont*, 1 Swans. 200.

(*q*) See *Whitaker v. Izod*, 2 Taunt. 115. In the *King v. Dixon* (3 Burr. 1687), an attorney had been served with a *subpœna duces tecum* to produce certain vouchers, which his client, Mr. Peach, had produced and relied upon before a master in Chancery, in order to found a prosecution for forgery against his client; and it was held that he was not bound to produce them.

(*r*) In general, a plaintiff has no right to the production of a deed not connected with his own title, and which gives title to the defendant (*Sampson v. Sweetenham*, 5 Madd. 16); and the Court will not compel an inspection where the parties have an adverse interest. *Threlful v. Webster*, 1 Bing. 161.

In *Miles v. Dawson* (1 Esp. C. 405), which was an action of trespass for seizing the plaintiff's ship, Lord Kenyon, in analogy to the practice of the Court of Chancery, would not compel a witness (who was called to prove that he had seized the ship under a written authority

The same principle applies where the document is in the hands of an attorney; he will not be compelled to produce it to be read where the disclosure would be prejudicial to his client (s).

Subpœna
duces
tecum.

from the defendant) to produce the power of attorney under which he had acted.

In *Bateson v. Hartsinke* (4 Esp. C. 43), in an action on a bill of exchange, where one of the defendants pleaded his bankruptcy and certificate, and the plaintiff sought to impeach the certificate, Lord Kenyon held that the solicitor under the commission was not bound to produce the proceedings; they were not his papers, but those of his clients.

In the case of *James Laing v. Barclay* (3 Starkie's C. 38), Abbott, C. J. held that the solicitor to the assignees under a commission of bankruptcy against George Laing, and who had been served with a *subpœna duces tecum* by the plaintiff to produce the proceedings under the commission, was justified in refusing to produce them, an action being then pending against the same defendants, in which his clients were plaintiffs.

In the case of *Harris v. Hill* (3 Starkie's C. 140), his Lordship also ruled, that a solicitor to the Manchester Waterworks Company was not bound to produce a deed of composition between the company and their creditors, the production of which would, he apprehended, be prejudicial to his clients.

So where a witness was called to produce a deed which he held as a security, objected to produce it, as affecting his interest, Abbott, L. C. J. refused to compel him. *Schlenker v. Moxey*, 3 B. & C. 789; 5 D. & R. 747; and 1 Carr. 178.

Where a defendant had worked coal-mines without interruption, under a special agreement, and on an action on the agreement the defendant called a trustee, who had been served with a *subpœna duces tecum*, to produce the deeds under which he held the legal estate, in order to show that the plaintiff had no longer any legal title, Richards, C. B. held that he could not be compelled to produce them. *Roberts v. Simpson*, 2 Starkie's C. 203.

And in general the Court will not in any

case compel a party to produce his title-deeds, where the production can occasion any prejudice to him (*Pickering v. Noyes*, 1 B. & C. 262); and the Court will not make an order for the production of deeds but where they have been deposited with the holder as a trustee for others only, or as a trustee for others jointly with himself (*ibid.*); where the Court observed, that parties are never compelled to produce their title-deeds; that if a *subpœna duces tecum* be served, the party must bring his deeds; but that if he state that they are his title-deeds, no Judge will compel him to produce them. Where in an action of covenant an attorney who held the deed for a third person objected to produce it, held that he was not compellable to do so but that the party might give secondary evidence of its contents, and the Court would not presume that there was a counterpart. *Ditcher v. Kenrick*, 1 Carr. 161.

A witness is compellable, on cross-examination by interrogatories, to produce letters relating to the subject interrogate, and not stated by the witness (an attorney) to be relative to confidential matters of any other sort. *Atkinson v. Atkinson*, 2 Add. (Arches) 469.

(s) *Copeland v. Watts*, 1 Starkie's C. 95. If, however, the client would have been compelled to produce the document, it seems that the agent would also be compellable to do so, otherwise by parting with the possession he might exclude the party from the benefit of the evidence. A lease, during a dispute between lessor and lessee, is ordered by a Court of Equity to be deposited with the attorney of the lessor; the attorney is bound to produce it on the trial of an ejectment brought by the lessee against the tenant in possession. *Doe v. Thomas*, 9 B. & C. 288. See further on this subject, Vol. ii. tit. CONFIDENTIAL COMMUNICATION; *R. v. Woodley*, 1 M. & R. 390; *R. v. Upper Boddington*, 8 D. & R. 726.

Writings to be produced where the production will not prejudice.

Where these objections do not apply, it seems that the writings in a man's possession are as much liable to the calls of justice as the faculties of speech and memory are. There can be no difference in principle between obliging a man to state his knowledge of a fact, and compelling him to produce a written entry in his possession which proves the same fact. Not only a man's estate, but even his liberty or life, may depend upon written evidence, which is the exclusive property of a stranger (*t*).

It is in all cases the duty of the witness to bring the document with him, according to the exigency of the writ (*u*); and it is a question of law for the Court, whether, upon principles of justice and equity, the production of the instrument ought to be enforced (*w*).

Notice to produce a deed.

Disobedience of the writ by the witness will not warrant the reception of parol evidence; but where the witness, *in fraud of the subpoena*, had transferred the document to the adverse party in the cause, it was held that parol evidence was admissible (*x*).

(*t*) As, for instance, where a man's title depends upon the precise time of his birth, and the executor of an accoucheur is in possession of an entry made by the latter, which would be legal evidence to prove the time of birth. In a criminal case proof that the prisoner at a particular time and place signed an instrument, may be decisive as to his innocence.

(*u*) *Amey v. Long*, 9 East, 473. *Cosen v. Dubois*, 1 Holt's C. 239. *Field v. Beaumont*, 1 Swanst. 209. *Reed v. James*, 1 Starkie's C. 132.

(*w*) In the case of *Copeland v. Watts* (1 Starkie's C. 95), which was an action by the lessor for breach of covenants in the lease, the plaintiff to prove the execution of the counterpart, which was missing, called upon the solicitor of a sub-lessee to produce an under-lease by the lessee of the same premises, in which the original lease was recited. The solicitor demurred to the production, conceiving it to be doubtful whether the interest of his client might not be prejudiced by the production of the under-lease. But Gibbs, C. J., after inspecting the under-lease, was of opinion that the reading of it would not prejudice the sub-lessee, and it was accordingly read.

See also *Crosen v. Dubois*, (1 Holt's C. 239), which was an action on a bill of

exchange, to which the defendant pleaded his bankruptcy and certificate. In order to defeat the certificate, the plaintiff called on the defendant's solicitor to produce the proceedings under the first of two commissions against the defendant, which had been left in his custody by the assignees under the first commission. The solicitor demurred to the production; and Gibbs, C. J. said, that if the production were likely to be prejudicial to the assignees, he would intercept them, but as he could not see any prejudice to the persons who had entrusted the solicitor with the proceedings, he could not withhold them, even although the documents might have been procured by other means. (*Ibid.*) In the case of *Pearson v. Fletcher*, (5 Esp. C. 90), which was somewhat similar to that of *Crosen v. Dubois*, Lord Ellenborough ruled that the solicitor to the commission was bound by public duty, to produce the proceedings.

In the case of *Reed v. James*, (1 Starkie's C. 132), Lord Ellenborough said that the witness, who was the petitioning creditor, could not, in an action by the assignees, with propriety refuse to produce the promissory note on which the debt was founded.

(*x*) *Leeds v. Cook & Ux.*, 4 Esp. C. 256.

And although an agent may not be compellable to produce the deeds of his principal (a party in the cause), yet he is liable, on declining to produce them, to be examined as to their contents (*y*).

Notice to produce a deed.

Where insufficient notice has been given to the attorney of a party to produce the deed, the attorney is not bound to produce it, although he has the deed in his pocket at the trial (*z*).

As a witness is bound to attend in court in obedience to the writ, so is he under an obligation to be sworn and give evidence on his appearance.

Witness cannot refuse to be sworn and give evidence.

If a witness for the Crown refuse to be sworn, he is guilty of a contempt of Court, and may be fined, and committed till he has paid the fine (*a*).

A clerk to the commissioners of taxes is bound, when subpoenaed, to produce his books, and answer all questions relevant to the issue, notwithstanding his oath of office (*b*).

The law protects a witness, as well as a party to the suit, from arrest, *eundo morando et redeundo* (*c*). And it is not essential to their protection that the witness should have been subpoenaed, if he has consented to attend (*d*). The Courts usually allow ample time for this purpose (*e*).

Protection of witness.

(*y*) In covenant by a remainder-man for not repairing, plea, that lessor was only tenant for life; held, that after notice on the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a *subpœna duces tecum*, his knowledge of the contents was not within the principle of privileged communications, which extends not beyond counsel and attorneys. *Earl of Falmouth v. Moss*, 11 Pri. 455.

(*z*) *Doe d. Wartney v. Grey*, 1 Starkie's C. 283.

(*a*) *Lord Preston's Case*, Salk. 278; Vin. Ab. Y. Lord Preston was committed by the court of quarter sessions for refusing to be sworn before the grand jury on an indictment for high treason. But a witness may refuse to be sworn in a civil case, if his expenses have not been paid.

(*b*) *Lee v. Birrell*, 3 Camp. 337.

(*c*) *Meekins v. Smith*, 1 H. B. 636.

Lightfoot v. Cameron, 2 Bl. 1113. *Randall v. Gurney*, 3 B. & A. 352.

(*d*) *Spence v. Stuart*, 3 East, 89. *Kinder v. Williams*, 4 T. R. 377. *Arding v. Flower*, 8 T. R. 534. *Ex parte Byne*, 1 Ves. & Beames, 316; 1 H. B. 636.

(*e*) 13 East, 16, n. (*a*). *Willingham v. Matthews*, 2 Marshall, 57; 2 Bl. 1113. *Hatch v. Blisset*, Gilb. Cas. 308; 2 Str. 986. *Strong v. Dickenson*, 1 M. & W. 490. In *Randall v. Gurney*, 3 B. & A. 252, where a party in London was required to attend an arbitration at Exeter on a given day, and three days before set off, and went, accompanied by his attorney, to Clifton, where his wife resided, and where were certain papers necessary to be produced before the arbitrator, and was occupied for a great part of two days in selecting and arranging the same, and in the afternoon of the second day was arrested; it was held, that he was not privileged from arrest under these circumstances, having been employed more than a reasonable time for the above purpose, and it not having been sworn that he was occu-

Protection
of.

The same indulgence has been extended to a witness attending an arbitrator under a rule of Nisi Prius (*f*); and to a petitioning creditor (*g*), a bankrupt or witness attending a meeting of commissioners (*h*); to a witness attending on the execution of a writ of inquiry (*i*); at the Insolvent Debtors' Court (*j*); attending a court martial under the Mutiny Act.

But a witness is not protected from being taken by his bail (*k*); for this is not an arrest (*l*), but a retaking.

Objection
to com-
petency.

It has already been seen that a witness may be incompetent, because he is incapable of religious obligation from youth, mental infirmity (*m*), ignorance or unbelief, or from infamy, or because he is interested in the cause. The objection arising from the ignorance, or unbelief, or turpitude of the witness, ought in its natural course to be taken before the witness is sworn, because it assumes that he is *incapable* of being bound by an oath.

Time of
objecting. ✓

In general, an objection to competency ought to be taken in the first instance, and before the witness has been examined in chief; for otherwise it would afford an unfair advantage to the other party, who would avail himself of the testimony of the witness if it were favourable, but would get rid of it by raising the

piced during all the time that he was at Clifton, in the object for which he went thither.

But in the case of *Ricketts v. Gurney*, (7 Price, 690), it having been sworn, on an application arising out of the same transaction, that a bail-bond should be given up to be cancelled, that the party was occupied during a part of the evening of the day of his arrival at Clifton, and the whole of the next, in examining and arranging the necessary papers, and that before he had finished he was arrested; the Court of Exchequer (the Chief Baron being absent, and Garrow, *B. dissente*), held that the defendant was privileged.

In an anonymous case (Smith's N. P. Rep. 355), it is stated to have been held, that a witness who lived twelve miles from the place of trial was not protected by his subpoena till twelve the next day.

A witness resident in London is not protected from arrest between the time of the service of the subpoena and the day appointed for his examination; but a witness coming to town to be examined is protected during the whole time which he remains in town *bonâ fide* for the purpose of giving his

testimony. Held also, that a witness is not protected in going to the solicitor's office to look at the interrogatories, as preparatory to his examination. *Gibbs v. Philipson*, 1 Russ. & M. (CH.) 19.

(*f*) *Spence v. Stewart*, 3 East, 80. *Moon v. Booth*, 3 Ves. 350. *Randall v. Gurney*, 3 B. & Ald. 252.

(*g*) *Selby v. Hills*, 6 M. & P. 255.

(*h*) *Spence v. Stuart*, 3 East, 80. *Arding v. Flower*, 8 T. R. 534. *Kender v. Williams*, 4 T. R. 377. *Ex parte Byne*, 1 Ves. & B. 316; 5 G. 2, c. 30, s. 6; 6 G. 4, c. 16, s. 117.

(*i*) *Walters v. Rees*, 4 Moore, 34.

(*j*) 6 Taunt. 356.

(*k*) *Ex parte Lyne*, 3 Starkie's C. 132.

(*l*) Per Richards, C. B. *Horn v. Swinford*, 1 D. & R. 20.

(*m*) One who is born deaf and dumb may, if he have sufficient understanding, give evidence by means of an interpreter. *R. v. Ruston*, Leach, C. C. L. 455; or by writing if able. *Morrison v. Lennard*, 3 C. & P. 127. Lunatics are competent during lucid intervals. Com. Dig. tit. Testmoigne.

objection if it turned out to be adverse. And therefore, where upon a trial for high treason it appeared, after a witness had been examined without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the statute to be given to the prisoner previous to his trial, the Court would not permit the evidence of that witness to be struck out (*n*). It has, however, even been held, that if it be discovered at any stage of the trial that a witness is interested, his evidence may be struck out (*o*); but this, it seems, is to be understood of those cases only where the objection could not have been taken in the first instance (*p*). Where the incompetency of a witness appeared on the face of his answers to interrogatories, it was held that the objection was waived by putting cross-interrogatories, and could not be insisted on at the trial (*q*). It was formerly the practice, when an objection was made to the competency of a witness, to make it before he was sworn in chief, and to swear and examine him, where his incompetency was supposed to arise from interest, on the *voire dire*; and after a witness had been examined in chief, the objection could no longer be taken (*r*). But the same strictness is not observed in modern practice: where the incompetency arises from interest, the objection may be taken after the witness has been examined in chief, if in the course of the cause it appear that he is interested (*s*); but if the objection on the score of interest be not taken previously to the examination in chief, the witness cannot be cross-examined as to the contents of a written document not produced, which might have been done had the objection been taken in the first instance (*t*).

Time of
objecting.

Before a witness takes the oath, he may be asked whether he believes in the existence of a God, in the obligation of an oath, and in a future state of rewards and punishments: and if he does, he may be admitted to give evidence (*u*). And it seems that he ought to be admitted if he believes in the existence of a God who will reward or punish him in this world, although he does not believe in a future state (*x*). But it is not sufficient that he believes himself to be bound to speak the truth, merely from a regard to character,

Examina-
tion as to
religious
belief.

(*n*) *R. v. Watson*, 2 Starkie's C. 158.

(*o*) *Turner v. Pearte*, 1 T. R. 720. *Howell v. Lock*, 2 Camp. 14. *Perigal v. Nicholson*, 1 Wightwick, 64. *Becchivy v. Gower*, Holt's C. 313. *Stone v. Blackburn*, 1 Esp. C. 37. *Moorish v. Foote*, 2 Moore, 500.

(*p*) *Moorish v. Foote*, 2 Moore, 508.

(*q*) *Ogle v. Paleski*, Holt's C. 485.

(*r*) *Lord Lovat's Case*, 9 State Tr. 639. 646. 704.

(*s*) *Perigal v. Nicholson*, 1 Wightwick, 64. *Turner v. Pearte*, 1 T. R. 717. *Stone v. Blackburn*, 1 Esp. R. 37.

(*t*) *Howell v. Lock*, 2 Camp. 14.

(*u*) *R. v. Taylor*, Peake's N. P. R. 11.

(*x*) See the judgment of Willes, C. J. in *Omichund v. Barker*, Willes, 550; 1 Atk. 21; 1 Wils. 84.

or the interests of society, or fear of punishment by the temporal law (*y*).

Want of
religious
belief.

The most correct and proper time for asking a witness whether the form in which the oath is about to be administered to him is one that will be binding on his conscience, is before that oath is administered. But although a witness shall have taken the oath in the usual form without making any objection, he may nevertheless be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answer in the affirmative, that he does consider the oath which he has taken to be binding upon his conscience, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used (*x*).

A Jew who has never formally renounced the religion of his ancestors, but considers himself to be a member of the established church, may be sworn on the Gospels (*a*).

Infant.

In criminal cases, where a person of tender years is a material witness, it is usual for the Court to examine the witness as to his competency to take an oath, before he goes before the grand jury. And if such a witness be found incompetent for want of proper instruction, the Court will, in its discretion, put off the trial, in order that the party may in the mean time receive such instruction as will qualify him to take an oath. Neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible (*b*).

Incompetency from
turpitude.

In considering the nature and extent of the objection to competency, arising from the alleged turpitude of the witness, it will be proper to inquire, 1st. What crimes or punishment incapacitate

(*y*) *R. v. Ruston*, Leach, C. C. L. 455.

(*z*) *The Queen's Case*, 2 B. & B. 284.

According to the opinion of the Judges, as delivered by Abbott, C. J., in answer to questions proposed by the Lords. Abbott, C. J., after delivering this opinion, added, "Speaking for myself (not meaning thereby to pledge the other Judges, though I believe their sentiments concur with my own), I conceive, that if a witness says he considers the oath as binding upon his conscience, he does in effect affirm, that in taking that oath he has called God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say is false; and having done

that, it is perfectly unnecessary and irrelevant to ask any further questions." And see *Sells v. Hoare*, 7 Moore, 36.

(*a*) *R. v. Gilham*, 1 Esp. C. 285. A member of a religious sect which objects to the ceremony of kissing the book, may be sworn without it. *Mee v. Reid*, Peake's C. 23. *Mildron's Case*, Leach's C. C. L. 450. *Colt v. Dutton*, 2 Sid. 6.

A witness, being of the Methodist persuasion, refusing to be sworn on the New Testament, was permitted to be sworn on the Old, stating he considered it binding to his conscience. *Edmonds v. Rowe*, 1 Ry. & M. C. 77.

(*b*) *Brazier's Case*, Leach's C. C. L. 237. *R. v. Tucker*, Phill. on Ev. 19.

a witness; 2dly. How the guilt is to be proved; 3dly. How the objection is answered; 4thly. The effect of incompetency.

I. Where a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others (c). Formerly, the infamy of the punishment, as being characteristic of the crime, and not the nature of the crime itself, was the test of incompetency (d); but in modern times, immediate reference has been made to the offence itself, since it is the crime, and not the punishment, which renders the offender unworthy of belief (e). By the common law, the punishment of the pillory indicated the *crimen falsi*, and, consequently, no one who had stood in the pillory could afterwards be a witness (f); but now a person is competent, although he has undergone that punishment for a libel, trespass, or riot (g); and on the other hand, when convicted of an infamous crime, he is incompetent, although his punishment may have been a mere fine (h).

The crimes which render a person incompetent are treason (i), felony (k), all offences founded in fraud, and which come within the general notion of the *crimen falsi* (l) of the Roman law, as

(c) Gilb. L. E. 256; 2 Bulst. 154; Brac. b. 4, c. 19; Fle. b. 4, c. 8.

(d) 2 Haw. c. 46, s. 102. *Pendock v. Mackender*, 2 Wils. 18; Fort. 209; 2 Hale, 277; Co. Litt. 6.

(e) *Pendock v. Mackender*, 2 Wils. 18; Willes, 666; Fortes. 209; 3 Lev. 426, 427; B. N. P. 292. *R. v. Davis*, 5 Mod. 75. *R. v. Ford*, 2 Salk. 690. *Priddle's Case*, 2 Leach, 496.

(f) Gil. Ev. 257.

(g) *Ibid*; Fort. 209. *R. v. Ford*, 2 Salk. 690; B. N. P. 292. *R. v. Crosby*, 10 St. Tr. App.

(h) The maxim is *ex delicto non ex supplicio mergit infamia*. The rules founded on this principle of exclusion are not, however, by any means satisfactory. A formal conviction is usually essential to the exclusion, yet a confession of turpitude on the part of a witness may just as reasonably excite doubts of the witness's veracity as a recorded conviction can do, which may have been founded merely on

the party's confession. Outlawry for any felony is sufficient to exclude a witness; yet outlawry, even for perjury, has no such effect: not to say that the distinction between felonies and misdemeanors affords a very fallible test of delinquency. And again, the making the restoration to competency to depend on the fact of the individual's having paid or suffered the penalty of his crime, does not seem to stand on any sound principle, and is in part, perhaps, attributable to the old doctrine of purgation.

(i) 5 Mod. 16. 74; Kel. 33.

(k) 2 Buls. 154; Co. Litt. 6; Ray. 369. *Walker v. Kearney*, 2 Str. 1148. *Jones v. Mason*, 2 Str. 843. Before the distinction between grand and petit larceny was abolished by the stat. 7 & 8 G. 4, c. 29, s. 2, a party convicted of the latter offence was competent, by the stat. 31 G. 3, c. 35.

(l) *R. v. Priddle*, Leach, 496. Co. Litt. 6, b; B. N. P. 291; Gil. Ev. 141.

Nature of
the crime.

perjury, subornation of perjury, and forgery (*m*), piracy (*n*), swindling, cheating (*o*). So also barrettry (*p*), conspiracy, at the suit of the King (*q*), præmunire (*r*), the bribing a witness to absent himself from a trial, in order to get rid of his evidence (*s*), conspiracy to procure the absence of a witness (*t*); so also the judgment on an attaint for a false verdict (*u*) will render the party so convicted incompetent; so also, as it seems, one who has been convicted of winning money by fraud, or ill practice at certain games, would be disabled by the stat. 9 Anne, c. 14, s. 5, from being a witness, since that statute not only imposes a penalty, but directs that the party shall be deemed infamous (*x*). But a conviction for keeping a gambling-house does not disqualify the defendant (*y*). The stat. 58 Geo. 3, c. 127, s. 2, 3, which enacts that persons excommunicated shall in no case incur any civil penalty or disability, has removed any objection to competency on the ground of excommunication, an objection which seems formerly to have been available (*z*).

Proof of
the conviction.

II. In order to incapacitate the party, the judgment must be proved (*a*) as pronounced by a court possessing competent jurisdiction (*b*). Proof of the verdict or conviction without the judgment is insufficient, since it may have been quashed on motion in

(*m*) Co. Litt. 6; Fort. 200; and see 5 Eliz. c. 14; 2 Haw. c. 23, c. 43, s. 25; 33 H. 6, 55; 2 Hale, 277; Summ. 263. *Jones v. Mason*, Str. 833. *Walker v. Kearney*, Str. 1148.

(*n*) 2 Roll. Ab. 886.

(*o*) Fort. 209.

(*p*) *R. v. Ford*, 2 Salk. 600. B. N. P. 202.

(*q*) *Rex v. Crosley*, Leach, 349; 33 Hen. 6, 55; 24 Ed. 3, 34; 1 Hale, 306; 2 Haw. c. 43, s. 25; 1 Haw. c. 72, s. 9; 2 Hale, 277; Co. Litt. 6; Summ. 263. But this, it has been said, is to be understood of a conspiracy to charge a person with a capital offence; in which case, upon conviction, he is liable to the villainous judgment, and to lose the freedom of the law. In a late case, it was held in the Ecclesiastical Court, by Sir W. Scott, that a conviction upon an indictment for a conspiracy to commit a fraud, by raising the price of the public funds by means of false rumours, did not render the affidavit of the party inadmissible. *Case of the Ville de Varsovie*, 2 Dods. Adm. R. 174. And in

the case of *Crowther v. Hopwood*, 3 Starkie's C. 21, it was held that such a conviction did not render a witness incompetent in a court of law; but in the case of *Bushell v. Barrett*, Ry. & M. 434, it was held by Gaselee, after consultation with Littledale J., that judgment for a conspiracy to prevent a witness from appearing to give evidence on an information under the revenue laws, took away competency.

(*r*) Co. Litt. 6.

(*s*) *Clunney's Case*, Fort. 208.

(*t*) *Bushell v. Barrett*, Ry. & M. 434.

(*u*) Co. Litt. 6; 2 Roll. 684.

(*x*) Fort. 208. Co. Litt. 6, b.

(*y*) *R. v. Grant*, 1 Ry. & M. 270.

(*z*) See as to the latter point, Gilb. Ev. 146, 2d edit.; 2 Buls. 155; B. N. P. 292.

(*a*) *Lee v. Gansel*, Cowp. 1; 2 Salk. 688; 2 Ins. 219.

(*b*) 1 Sid. 51; Ray. 52. It must appear from the caption, that the court and jurors had jurisdiction. *Cooke v. Maxwell*, 2 Starkie's C. 183.

arrest of judgment (*c*). And the judgment must be proved by the record in the usual way (*d*); but it is not material to show that judgment has been executed (*e*); so it may be shown that the party has been outlawed for treason or felony, since the effect of outlawry in such case is the same with judgment upon a verdict, or by confession (*f*). An admission by the witness himself that he is still confined in prison under a judgment for felony, or that he has committed perjury, or any other offence, will not incapacitate him, although it may discredit him (*g*).

Proof of
the conviction.

It seems to be a general rule, that a witness is in no case legally incompetent to allege his own turpitude, or to give evidence which involves his own infamy (*h*), or impeaches his most solemn acts (*i*), unless he be rendered incompetent by a legal interest in the event of the cause, or in the record.

A witness for the Crown, on a charge of conspiracy, who admits that she has on a former occasion, at the instance of the defendant, sworn falsely to the fact which she is called to prove, is still competent (*k*).

III. The objection to competency on the ground of infamy may be answered, 1st, By proof that the party has been admitted to his clergy, and undergone such punishment as is equivalent to clerical purgation at the common law, or that he has undergone the sentence according to the late statutes; 2dly, By proof of pardon; 3dly, By proof of the reversal of the judgment.

Competency, he restored.

1st. In order to illustrate this doctrine, a few previous observations will be necessary. Formerly the benefit of clergy was granted indiscriminately to the clergy, and to such laymen as could read; but by the stat. 4 H. 7, c. 13, clergy was to be allowed but once, without the actual production of letters of orders, and all laymen

By proof of admission to clergy.

(*c*) *Rex v. Crosly*, 2 Salk. 688; 2 Inst. 219. *Lee v. Gansel*, Cowp. 1; Str. 1148. *Sutton v. Bishop*, 4 Burr. 2283.

(*d*) 2 Haw. c. 46, s. 104; 1 St. Tr. 208; 2 St. Tr. 307. 436. 455; 3 St. Tr. 425; 4 St. Tr. 130; 1 Cowp. 1. *Infra*, tit. JUDGMENT.

(*e*) 2 Salk. 689; 3 Inst. 219; 3 Lev. 426. But see Co. Litt. 6; Kel. 37; Summ. 263; 2 Hale, 277; 5 Mod. 75, 76.

(*f*) 2 Haw. c. 48, s. 22; 3 Inst. 212. *Collier's Case*, Sir T. Ray. 369. But outlawry in trespass does not disqualify

the party as a witness, although it disqualifies him as a juror. *Withersoll's Case*, Cro. Car. 144. 147; W. Jones, 198; 1 Hale, 305. Co. Litt. 6, b.

(*g*) *R. v. Watson*, 2 Starkie's C. 116. *Rex v. Castel Careiminian*, 8 East, 78. *R. v. Teale*, 11 East, 307. *Rands v. Thomas*, 5 M. & S. 244.

(*h*) *Burrough v. Martin*, 2 Camp. 112. And see *Doe v. Perkins*, 3 T. R. 750; *Tanner v. Taylor*, 3 T. R. 754.

(*i*) *Vaughan v. Martin*, 1 Esp. C. 440. See *Doe v. Perkins*, 3 T. R. 749.

(*k*) *Catt v. Howard*, 3 Starkie's C. 3.

Clerical
purgation.

were to be burnt in the hand (*l*). Until the stat. 18 Eliz. c. 7, a felon who was entitled to the benefit of clergy was delivered over to the ordinary to make purgation, that is, to be purged of his offence upon oath, a proceeding which, after a solemn conviction in a court of law, could seldom be accomplished without the aid of deliberate perjury (*m*); and after he had been thus purged or acquitted, the party was in all respects a competent witness (*n*). The stat. 18 Eliz. c. 7, abolished the practice of delivering the convicted clerk to the ordinary, but enacted, that upon the allowance of clergy and burning in the hand, he should be enlarged and delivered out of prison, enabling the Judge in his discretion to imprison him for a year. As, after this statute, competency could no longer be restored by purgation, it was held that the disabilities consequent on conviction were removed by burning in the hand, and delivery out of prison (*o*).

And as peers and real clerks had before the statute been entitled to the benefit of purgation, without any burning in the hand, under the stat. 4 H. 7, they were held to be competent after the Act of the 18 Eliz. without burning in the hand; peers, after the first conviction, and clerks *toties quoties* (*p*). With respect to laymen, the burning in the hand operated as a statute pardon (*q*). By the stat. 4 Geo. 1, c. 11, in the case of grand or petit larceny, where the convict is entitled to benefit of clergy, and liable only to the penalties of burning in the hand or of whipping, the Court before whom the prisoner is convicted, instead of ordering the offender to be burned in the hand or whipped, may direct that he shall be transported to America for the space of seven years. And on the conviction of an offender for a crime for which he would be excluded from the benefit of clergy, but to whom mercy is extended on condition of transportation, the Court may allow him the benefit of a pardon under the great seal. And it is prescribed by the same

(*l*) This distinction was abolished for a time by the stat. 28 Hen. 8, c. 1, and 32 Hen. 8, c. 3, but was restored virtually by the stat. 1 Edw. 6, c. 12. As to peers and women, *vid. infra*.

(*m*) See remarks on this complication of wickedness, Hob. 291; 3 P. Wms. 448.

(*n*) The convicted clerk was sometimes delivered over *absque purgatione faciendâ*, on which he was to remain in prison all his life, without the power of acquiring any personal property, or receiving the profits of lands; and to remedy this abuse the statute 18 Eliz. c. 7, was passed.

(*o*) *R. v. Ld. Warwick*, 5 St. Tr. 172; Hob. 252; B. N. P. 292; Kel. 37, 38; Bulst. 155; 2 Haw. c. 33; Sty. 388; Godb. 288; *R. v. Ld. Castlemaine*, 2 St. Tr. 46.

(*p*) 1 Hale, 529; Fost. 356; 2 Hale, 388; 3 P. Wms. 487; 5 Rep. 110. *Searle v. Williams*, Hob. 288.

(*q*) 2 Haw. c. 46; B. N. P. 292. *Searle v. Williams*, Hob. 294; Ld. Raym. 370. 380; Godb. 288; Sty. 388; Kel. 38; Vent. 349; Skin. 578; 5 Mod. 13; 2 Sid. 51; Hob. 81.

Act, s. 2, that where any such offenders shall be transported, and shall have served their respective terms, according to the order of such Court, such services shall, to all intents and purposes, have the effect of a pardon as for the crime for which they were so transported. Clerical purgation.

By the stat. 19 Geo. 3, c. 74, s. 3, it is directed that fine or whipping may be imposed and inflicted, instead of burning in the hand, in *all clergyable felonies* except *manslaughter*; and that such punishment when imposed or inflicted instead of burning, shall have the like effect and consequences to the party, as to capacities and credits, as if he had been burned. The effect, therefore, of these statutes on the common-law doctrine (*r*) of purgation, seems to have been this: If a layman were convicted of a clergyable felony, and were burned in the hand, or suffered any punishment inflicted by the above statutes in lieu of it, his competency was restored by the execution of the sentence. If a peer were convicted of such felony, or indeed of some felonies which were not clergyable (*s*), he was entitled to be discharged for the first offence, and retained his competency; and a real clerk remained competent, although he had committed several clergyable felonies. The mere admission to clergy, where the felon was liable to be burned in the hand, did not restore competency (*t*); and therefore it was not sufficient to produce the record whereby clergy was granted, *without* proof of burning in the hand (*u*), except in the case of a peer or a clerk; but it was further to be proved that the witness had been burned in the hand, or that some other punishment authorized by one of the above statutes had been awarded by the Court in lieu of such burning in the hand, and had been executed. But the King's pardon for burning in the hand had the same effect as burning in the hand would have had (*x*). With respect to petit larciny, as the offender was not obliged to pray his clergy, it followed that his competency could not be restored by clerical purgation, or by the burning in the hand, or other punishment

Effect of fine, &c. instead of burning in the hand.

(*r*) By the stat. 3 & 4 Will. & Mary, c. 9, s. 5, women are entitled to the benefit of the statute, as men are to the benefit of the clergy. By the stat. 5 Ann. c. 6, the necessity of reading was abolished.

(*s*) By the stat. 1 Edw. 6, c. 12, a peer is to have the benefit of clergy in the same manner as a layman for the first offence, although he cannot read, and without burning, for all offences then clergyable to commoners, and also for housebreaking,

highway robbery, horse-stealing, and robbing churches. 2 Hale, 372; Hob. 294. *R. v. Duchess of Kingston*, 11 St. Tr. 198.

(*t*) *Per Curiam*, T. Ray. 380. *Ld. Warwick's Case*, 5 St. Tr. 168.

(*u*) *Ld. Warwick's Case*, T. Ray. 380; 5 St. Tr. 168. *Burridge's Case*, 3 P. Wms. 485. 490. *Searle v. Williams*, Hob. 288. *Armstrong v. Lisle*, Kel. 93.

(*x*) 4 Comm. 395.

Effect of
fine, &c.

substituted for it; and the inconvenience of this being felt (*y*), the stat. 31 Geo. 3, c. 35 (*z*), enacted, that no witness should be deemed to be incompetent by reason of his conviction of petit larceny. By the stat. 9 Geo. 4, c. 32, s. 3, 4 (*a*), the endurance of the punishment, in all cases of misdemeanor except perjury or subornation of perjury, restores the competency of the offender.

Pardon.

2dly. Next it may be shown that the proposed witness has received a pardon for his offence; either, 1st, from the King, under the great seal; or, 2dly, under an act of parliament. It was long since held, notwithstanding doubts upon the subject (*b*), that a pardon, whether by the King, under the great seal, or by act of parliament, removed not only the punishment, but also all disabilities consequent upon conviction, and restored the competency of the party as a witness (*c*). And it is reasonable that it should, for otherwise a person might for one fault be for ever excluded as a witness, even after he had, by a long course of good conduct, in some measure regained the character which he had lost. And although a pardon cannot convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred, after inquiry, upon good and sufficient grounds, on an object worthy of the indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury (*d*).

Competency—restoration of.

A pardon will restore competency in all cases where the disability is a consequence of the judgment, and not a part of the judgment (*e*). But neither the King's pardon, nor any thing tantamount to it, will, it is said, restore competency where the disability

(*y*) See *Pendock v. Mackender*, 2 Wils. 18.

(*z*) The distinction between grand and petit larceny is now abolished by the stat. 7 & 8 Geo. 4, c. 28, s. 13; 9 Geo. 4, c. 32, s. 3.

(*a*) See also the st. 7 & 8 G. 4, c. 28, s. 13; 9 G. 4, c. 32, s. 3; *infra*, 100, as to felonies.

(*b*) Palm. 412; Latch. 81; 2 Bulst. 114. *Brown v. Crashaw*, 2 Bulst. 154; 4 St. Tr. 269. *Ld. Castlemaine's Case*, 3 St. Tr. 36; 2 Bro. 17.

(*c*) Gilb. Ev. 26. *R. v. Cellier*, T. Ray. 369. *Cuddington v. Wilkins*, Hob. 67. 81. *R. v. Crosby*, Ld. Raym. 39. *R. v. Ld. Castlemaine*, T. Ray. 379. *Reilly's Case*, Leach, 510; 2 Hale, 278;

Brownl. 47; Bulst. 154–156. A pardon may also be granted on the ground of some error in the proceedings. See 2 Hargr. Jur. Arg. *Crosby's Case*, 5 Mod. 15; 2 Hale, 278. It is the ordinary practice at the present day, where a prisoner has been improperly convicted, and this appears to the Judges, on a case reserved, to apply for a pardon.

(*d*) 2 Hale, 278. *R. v. Crosby*, 5 Mod. 15; and see 2 Hargr. Jur. Arg.

(*e*) Per Holt, C. J., 2 Salk. 689; 1 Ld. Ray. 256; 12 Mod. 139; Comb. 459; 2 Salk. 512; Carth. 421; Holt, 535; 5 Mod. 345; 3 Mod. 342; Gilb. Ev. 260. But this was formerly doubted. Brownl. 47; 2 Bulst. 154; 2 Sid. 221; 2 Danv. Ab. 163; Cro. Jac. 662.

is part of the judgment, and not a consequence of it (*f*). Subject to this limitation, a pardon will restore competency in all cases and at all times, as in cases of conspiracy, perjury and forgery (*g*), although the party has undergone an infamous punishment, as by standing in the pillory for cheating (*h*), and after attainder for treason or felony (*i*). So where he has been convicted of felony in taking a false oath to obtain probate of a will under the stat. 31 Geo. 2, c. 10; so where the pardon is received after conviction, but before judgment (*k*). Pardon.

It has been held that a *general* pardon, after a conviction for felony, or after an outlawry for felony, will not restore competency (*l*); but it seems that the burning in the hand may be discharged by the King's pardon (*m*). The pardon must be produced under the great seal (*n*). A pardon under the King's sign manual, or privy seal, was formerly insufficient, since the warrant was countermandable (*o*); but it is now provided by the stat. 7 & 8 Geo. 4, c. 28, s. 13, that where the King shall extend his mercy to any offender convicted of any felony, and by warrant under his sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon, the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition, in case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony in respect of which such pardon was granted. The stat. 9 Geo. 4, c. 32, s. 3, enacts, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted: provided that nothing therein contained, nor the enduring such

(*f*) Per Holt, C. J., Holt's R. 689. 691. Hawk. b. 2, c. 46, s. 112. *R. v. Greepe*, 2 Salk. 514. *Crosby's Case*, 2 Salk. 689. *R. v. Warden of the Fleet*, R. T. Holt, 135.

(*g*) 1 Hale, 306.

(*h*) *R. v. Lord Castlemaine*, T. Ray. 370. So where a witness, after conviction for a crime, has stood in the pillory, the objection is removed by a general act of pardon. *R. v. Crosby*, Lord Ray. 39.

(*i*) 2 Haw. c. 46, s. 110; c. 37, s. 48, 49, 50.

(*k*) *R. v. Reilly*, Leach, 512.

(*l*) *R. v. Lord Castlemaine*, 3 St. Tr. 46, 47. *R. v. Lord Warwick*, 5 St. Tr. 106. But see *R. v. Rookwood*, 4 St. Tr. 642; 3 Lev. 426.

(*m*) 3 Lev. 426.

(*n*) 2 Haw. c. 37. *R. v. Lord Warwick*, 5 St. Tr. 166; Fost. 62; 1 Wils. 217. *Murphy's Case*, Leach, 117.

(*o*) *R. v. Lord Warwick*, 5 St. Tr. 166. *R. v. Miller*, 2 Bl. R. 797. *Gully's Case*, Leach, 116.

Pardon.

punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other felony. Sec. 4, reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses, and that it is expedient to restore the competency of such parties after they have undergone their punishment, enacts that where any offender hath been or shall be convicted of any such misdemeanor, except perjury or subornation of perjury, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not after the punishment so endured be deemed to be, by reason of such misdemeanor, an incompetent witness. In case of a conditional pardon, proof must be given that the condition has been performed (*p*).

Reversal of judgment.

3dly. By proof of a reversal of the judgment or outlawry by writ of error, which must be proved by the production of the record. Where it was objected that the witness had been attainted by virtue of an act of parliament, for not having surrendered himself before a particular day, it was answered that the witness had surrendered within the limited time; and the record of the proceeding on the part of the Crown against the witness on that statute, and of the plea on the part of the witness in his defence, that he did surrender within the time, which plea was admitted by the Attorney-general to be true, was held to be conclusive evidence of the surrender within the time (*q*).

Effect of disability.

IV. The judgment for an infamous crime, even for perjury, does not preclude the party from making an affidavit with a view to his own defence (*r*). He may, for instance, make an affidavit in relation to the irregularity of a judgment in a cause to which he is a party (*s*), for otherwise he would be without remedy. But the rule is confined to defence, he cannot be heard upon oath as a complainant (*t*). Where a witness becomes incompetent from infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness, previous to his conviction, evidence may be given of his handwriting (*u*).

(*p*) Gilb. Ev. 259. Hawk. P. C. c. 37, s. 45. *Burridge's Case*, 3 P. Wms. 485. But where a party had been sentenced to transportation, and confined to the hulks for a term, and discharged at the end of the term, it was held that his having twice escaped, for a few hours each time, did not destroy the effect of a pardon. *R. v. Badcock*, Russ. & Ry. C. C. L. 248.

(*q*) *Lord Lovat's Case*, 9 St. Tr. 652. 665.

(*r*) *Davis v. Carter*, 2 Salk. 461; 2 Str. 1148.

(*s*) *Ibid*.

(*t*) Salk. 461; Str. 1148.

(*u*) *Jones v. Mason*, Str. 833.

The general principle which operates to the exclusion of an interested witness has already been noticed; its application in practice will now be more fully adverted to. It is proposed to consider (v).

- I. The nature and extent of the disqualifying interest, the time and manner of acquiring it, and exceptions from necessity;
- II. Its effect upon secondary evidence; and,
- III. The mode of enforcing or removing the objection.
- IV. The practical effect of the rules on this subject.

I. The interest, to disqualify, must be some legal, certain and immediate interest, however minute, in the *result* of the cause, of in the *record*, as an instrument of evidence, acquired without fraud.

Nature of the disqualifying interest.

In the first place, it must be a *legal* interest in the event of the suit, or in the record, as contradistinguished from mere prejudice or bias (w), arising from the circumstance of relationship, friendship,

Must be a legal interest.

(v) A party to a suit is of course usually disqualified on the ground of interest; but as the exclusion is by no means wholly founded on a consideration of the party's interest, it may be more convenient to discuss this subject separately. See Vol. II. tit. PARTIES.

(w) Two actions are brought against two persons for the same assault, each defendant is a competent witness for the other. Per Abbott, L. C. J., 5 B. & C. 387; and per Ashurst, J., 1 T. R. 301. And in general similarity of situation is no objection, if the witness would not either gain or lose by the particular event. See *Bent v. Baker*, 3 T. R. 27. An attorney who has prepared a deed, the validity of which is questioned, is a competent witness, although an action is pending against himself, in which he must fail if the deed be invalid. See also *Bath v. Montague*, cited Fortes. 247. Vol. II. tit. ACCOMPLICE. *R. v. Gray*, 2 Selw. N. P. 1148, ix. 12. 22 edit. It was formerly held that the possibility that the verdict might, in another proceeding in which the witness was interested, *influence* the jury, was sufficient to disqualify the witness. *R. v. Whiting*, 1 Salk. 283. Lord Holt there ruled, on the trial of an indictment for a cheat, in obtaining a person's subscription

to a note for 100*l.* instead of a note for 5*l.*, that the maker was not a competent witness. See also *R. v. Nunez*, 2 Str. 1043. But it has long been settled that such an objection affects the credit only, not the competency of a witness. *R. v. Boston*, 4 East, 572; *R. T. Hardwicke*, 572. See below, tit. COMPETENCY OF PROSECUTORS; Vol. II. tit. USURY.

In an action by a bankrupt against his assignee, the official assignee is a competent witness to support the bankruptcy, his allowance being uncertain, and dependent on the discretion of the commissioners. *Giles v. Smith*, 1 Mood. & R. 443. In an action for mismanaging a farm, the sub-lessee is, it has been held, competent to prove proper cultivation. *Wishaw v. Barnes*, 6 Camp. 341. In an action for falsely representing the circumstances of a third person, the latter is competent to prove his insolvency. *Smith v. Harris*, 2 Starkie's C. 47. In an action for loss alleged to have been occasioned by the defendant's breach of contract, in neglecting to insure copies of a work from fire, one who has purchased a number of the copies from the plaintiff is competent to prove the contract. *Mauman v. Gillett*, 2 Taunt. 325, n. In case for infringing a patent, the purchaser of a

Legal interest.

or any other of the numerous motives by which a witness may be supposed to be influenced.

Thus in a criminal case a witness is competent, although she believes that the conviction of the prisoner will be the means of saving her husband's life (*w*). So an accomplice is competent to give evidence against his confederates, notwithstanding his own expectation of pardon in case of their conviction. So, although the witness has derived his maintenance from the party. And in general the witness is competent, although he wishes that the party may succeed in whose favour he bears testimony.

A witness is competent notwithstanding an illegal agreement, the effect of which, if legal, would be to render him incompetent (*x*).

Apprehension of interest.

If a party be really interested in the event of a cause he is not competent, although he does not apprehend that his interest is a legal one (*y*), for it would be exceedingly dangerous to violate a general rule because the witness does not understand his legal responsibility. If a witness suppose that he is under an *honorary* though not a *legal* engagement, as to indemnify the bail, he is still competent, for he is under no binding engagement, and it would be highly inconvenient to make competency in such cases to depend on the witness's notions of propriety, and would savour of inconsistency to found a suspicion of his veracity upon a just and honourable feeling (*z*). It has indeed been said that a witness who conceives himself to be under a *legal* engagement is incompetent, although he is mistaken (*a*). It would, however,

licence to use the patent is a competent witness for the plaintiff. *De Rose v. Fairlie*, 1 Mood. & R. 457.

A., on becoming partner with *B.*, borrows a sum of money from *C.*, to whom he gives his note; after the dissolution *C.* indorses the note to *B.*, who sets off the amount in an action by *A.*, founded on a partnership claim; *C.* is competent to prove the loan and transfer. *Halsten v. Seaton*, 2 M. & W. 47. And see tit. BILL OF EXCHANGE—PARTNERSHIP. The lessee claims as heir of *T. B.*, the son of an elder brother of *T. B.* is competent. *Doe v. Clarke*, 3 Bing. N. S. 429. A rate-payer, though interested in the borough fund, is competent in a suit by the assignee of a corporation lease against. *Doe v. Maple*, 3 Bing. N. C. 832. For further illustrations of the general principle, see tit. SURETY—TRUSTEE—EXECUTOR—LEGATEE—CREDITOR—REVERSIONER—CO-TRESPASSER.

(*w*) *R. v. Rudd*, Leach, 154; but it has been held that a witness who conceives himself to be interested, although he be not so, is incompetent. *Fotheringham v. Greenwood*, Str. 129; 1 T. R. 296. *Chapman's Case*, Str. 129; *tam qu. et vid. infra*, 105.

(*x*) *Humphrey v. Miller*, 4 Carr. & P. C. 7. As where in an action against the secretary of a society for a libel, it was held that a member was competent, although he had agreed to contribute towards all law expenses, for an agreement to indemnify against doing wrong is void.

(*y*) *R. v. Walker*, 1 Ford. MSS. 145. *Parker v. Whitby*, 1 Turn. & R. 372.

(*z*) *Pederson v. Staffles*, 1 Camp. 145; 1 Str. 129.

(*a*) *Chapman's Case*, cited Str. 129. *Fotheringham v. Greenwood*, Str. 129. *R. v. Walker*, 1 Ford. 145. By Lord Loughborough, C. J., and Gould, J., in *Trelawney v. Thomas*, 1 H. B. 307;

be productive of great inconvenience to substitute a witness's mistaken opinion of his legal liability for the more plain and simple test of actual liability; it might be impossible to render him competent, even by means of a release, for he might be sceptical as to the operation of a release, and the practice might open a door to fraud. The party who calls the witness has an interest in his testimony, which ought not to be defeated by any thing short of a legal interest in the event; and if the objection were allowed to prevail in this instance, the principle would extend to the reception of a witness who has a legal interest in the event, but who fancies that he has not.

Apprehension of interest.

The interest must be a present, certain, vested interest (*b*), and not uncertain or contingent (*c*). And therefore the heir apparent to an estate is competent to give evidence in support of the claim of the ancestor, although one who has a *vested* interest as a remainder-man is incompetent (*d*). So it was held that a steward was competent to prove that a fine was payable on the death of the lord, although the establishment of the affirmative might render a re-admission necessary, and entitle him to a fee (*e*).

Must be direct and certain, and not contingent or doubtful.

So in an action for acting as an assistant, the clerk of the company of wire-drawers was held to be a competent witness, although he was entitled to a crown for swearing in an assistant; for although the suit might cause the defendant to be sworn, that was not the direct object of the suit, nor a necessary consequence of a verdict for the plaintiffs (*f*). So it was held that one who

Rudd's Case, Leach, C. C. J. 154. In the case of the *Amitie Villeneuve*, 5 Robinson's Adm. R. 344, Sir W. Scott rejected the evidence of a witness who stated that he conceived that he would be entitled to share in case his vessel should be deemed joint-captor, although he had signed a release; and the learned Judge decided this on the distinction which he had always understood to prevail between a witness who says only that he "expects to share from the bounty of the captors, and one who thinks himself actually entitled in law. See also the case of *The Galen*, 2 Dodson's Adm. R. 20.

(*b*) *R. v. Cole*, 1 Esp. C. 98. As where a witness has a power of attorney from the plaintiff to receive the sum recovered, and pay himself the amount of a debt due to him. *Powel v. Gordon*, 2 Esp. C. 735.

Or has made an agreement with the plaintiff, that he shall have a lease of the lands recovered. *Gilb. Ev.* 122. Or is bound to pay a sum of money in case the plaintiff fails. *Forrester v. Pigou*, 1 M. & S. 9. *Fotheringham v. Greenwood*, 1 Str. 129.

Where a witness who, if the bishop failed to present to a benefice on a lapse, would as tenant by the curtesy, be entitled to present, it was held that he was not a competent witness for the defendant in a *quare impedit*. *Gully v. Bishop of Exeter*, 5 Bing. 171, and 2 M. & P. 266.

(*c*) *Doug.* 134; 1 T. R. 163; 1 P. W. 287.

(*d*) *Salk.* 283; *Lord Raym.* 724.

(*e*) *Champion v. Atkinson*, 3 Keb. 90

(*f*) *Company of Gold and Silver Wire-drawers v. Hammond*, *Ford's MSS.*

had lands in the parish, but who was not actually rated to the poor, was competent in a case of settlement (*g*).

Doubtful
interest.

Where the interest is of a doubtful nature, the objection goes to the credit, not the competency of the witness (*h*). The possibility of an action being brought against the witness, in case his testimony shall not prevail, and the tendency of his testimony to render his liability less probable, will not exclude him. One who has given bond for an administrator's due administration of the intestate's effects, is competent, in an action against the administrator, to prove a tender (*i*). So one who has filled a corporate office is a competent witness for the defendant to prove a custom, which, if established, would be material to show that the witness had exercised a corporate office legally (*j*).

(*g*) *R. v. Prosser*, 4 T. R. 17. *R. v. Gisburn*, 15 East, 57. *R. v. Killerby*, 10 East, 293. *R. v. Terrington*, 15 East, 471. *R. v. South Lynn*, 5 T. R. 664. *R. v. Kirdford*, 2 East, 559. *Deacon v. Cock*, Taunt. Spring Assizes, 1789; cor. Buller, J., cited Nolan's P. L. vol. 1, p. 378. But see the forcible observations made upon these cases by Sir D. Evans, in his edition of Pothier, vol. 2, p. 306. See *Rhodes v. Ainsworth*, 2 Starkie's C. 215. Whether the principle laid down in the case of the *King v. Kirdford*, and the previous decisions, was properly applied or not, is a question which the stat. 54 G. 3, c. 170, s. 9, has rendered immaterial; the cases themselves are still of importance, to show the reliance which the Court placed on the general principle.

(*h*) The old cases (observes Lord Hardwicke) on the competency of witnesses have gone upon very subtle grounds; but of late years the Courts have endeavoured as far as possible, consistently with those authorities, to let the objection go to the credit rather than the competency of the witness. See *R. v. Bray*, R. T. Hardw. 360; 1 T. R. 300; 3 T. R. 32; Co. Litt. 6; 1 Keb. 836. *Bent v. Baker*, 3 T. R. 27. *Smith v. Prager*, 7 T. R. 60; Gil. Ev. 232. *Abrahams v. Bunn*, 4 Burr. 2251; and see *Masters v. Drayton*, 2 T. R. 496. Where the deposition of a witness in a suit for pradial tithes described him as of the parish in which the tithes accrued, and were sought to be covered by a township

modus, held that it was admissible, for the deponent might be an inhabitant merely, and not an owner, or the owner of lands not covered by the modus. *Jackson v. Benson*, 2 Y. & J. 49.

(*i*) *Carter v. Pearce*, 1 T. R. 163. So an unsatisfied creditor is a competent witness for the administrator under the plea of *plene administravit*. Per Parke, J., notwithstanding the dictum of Lord Ellenborough, in *Craig v. Cundell*, 1 Camp. 381, to the contrary; and see *Paull v. Brown*, 6 Esp. C. 34. If the intestate were living, such evidence would be admissible, and it is difficult to see how his death can make any difference as to the competency of the witness.

(*j*) *R. v. Bray*, C. T. H. 358. See also *R. v. Boston*, 4 East, 574, where it was held that a witness was competent on a trial for perjury, although a civil action was pending between himself and the defendant, involving the same question, and to be tried at the same assizes. The decisions in the case of *R. v. Whiting*, 1 Salk. 283, and *R. v. Nunez*, 2 Str. 1043, were overruled, C. T. H. 572; and again, in the above case of *R. v. Boston*. So a witness is competent to prove a codicil made subsequently to a second will, and reciting a prior will, although he has acted under the first, and may be liable as executor *de son tort* in case it should be set aside. *Baillie v. Wilson*, cited 4 Burr. 2254. See also *Goodtitle v. Wilson*, 1 Doug. 140.

A considerable change has been made as to the competency of witnesses objected to on the score of interest by the late statute 3 & 4 Will. 4, c. 42; and as doubts have been entertained upon the construction and operation of this statute, which does not absolutely extinguish the objections to which it applies, but only removes them conditionally on a proper indorsement being made upon the record, it is proposed to consider the effect given to such objections independently of the statute, and afterwards to cite the statute itself and the decisions upon it, with a few remarks.

The predicaments in which a witness may be incompetent in respect of the *result* admit of three varieties (*k*):

Interest in the result.

1st. Where actual gain or loss would result simply and immediately from the verdict and judgment.

2dly. Where the witness is so situated that a legal right or liability, or discharge from liability, would immediately result from the verdict and judgment.

3dly. Where the witness would be liable over to the party calling him in respect of some breach of contract or duty on the part of the witness involved in the issue.

1st. Where actual gain or loss would result simply and immediately from the verdict and judgment:

In the immediate and legal result.

(*k*) It seems to be convenient to retain the threefold division adopted in the last edition of this work, particularly with a view to the consideration of the effect of the late stat. 3 & 4 Will. 4, c. 42. Tindal, C. J. in *Doe v. Tyler*, 6 Bingh. 394, divides the benefits by which a witness may be disqualified into two classes; first, where the witness has a direct and immediate benefit from the event of the suit itself; and secondly, where he may avail himself of the benefit of the verdict in support of his own claims in a future action. The first of the three classes above mentioned corresponds with the first of the two noticed by C. J. Tindal; this class is distinguished from the rest by a definite limit, very useful to be observed with reference to the late statute, which does not, as will be seen, affect direct interests resulting immediately from the executed judgment, independently of any collateral use of the record. The second of the classes referred to by C. J. Tindal contains (independently of those cases where the witness is interested in the record, as evidence to prove a custom or other matter of fact) two sub-

classes: 1st, Where the benefit of which the witness may avail himself in a future action will be the immediate result of the first trial, as where the witness would acquire an immediate title to contribution; or 2dly, where the witness would neither acquire a right nor repel a right of action by the result, but has an interest in repelling a claim to consequential damages, depending on the result of the action. It may be advisable to retain this distinction, which exists in principle, and serves to illustrate the operation of the late statute. It is observable that in cases which fall within the second as well as the third of those classes, the witness is but indirectly interested; the distinction between them is that in the second a right or obligation immediately results; the benefit may consist either in the acquisition of a right or the discharging an antecedent obligation: in the third the obligation or liability is antecedent to the action, and the benefit does not in any instance consist in the acquisition of a right, but only in protection from consequential damage.

In the immediate and legal result.

As where the proposed witness is a party, though but a nominal party, to the suit (*l*); or is a party in beneficial interest (*m*); or is *quasi* a party, from having entered into a rule of court or contract that another cause to which he is a party shall abide the same result with that in which he proposes to give evidence (*n*); or where the immediate effect of the verdict will be to increase or diminish a fund in which he has a joint interest; as where the bankrupt, or a creditor on a bankrupt's estate, seeks to increase the fund (*o*); or a residuary legatee to increase the estate (*p*); or a co-partner to increase the joint funds; or one jointly interested in the subject of the suit is called as a witness for that party (*q*); or where the effect would be to deprive the witness of

(*l*) As in the case of guardian of a minor, or governor of the poor, who is in the first instance liable to costs. *R. v. St. Mary Magdalen*, 3 East, 7. Trustees empowered as a public body to sue and be sued in the name of their treasurer, but to be deemed the plaintiffs, are not, it seems, competent witnesses for the plaintiff in an action so brought. *Whitmore v. Wilks*, 1 M. & M. 214, and 3 C. & P. 364.

(*m*) It will be presumed that the action is brought by the direction of the party beneficially interested. In an action on a policy of insurance, brought in the names of the brokers, it appeared that *A.*, one of the parties for whose benefit the policy was effected, had before the action released to the plaintiffs all actions which he might have under the policy, and also that since the action two persons, to whom the whole interest on the policy had been assigned, had, under an order of the Court of C. P., indemnified the plaintiff against all costs, and *A.* was tendered and examined as a witness for the plaintiffs on the trial; held, on error, that as the action had been brought in the names of the brokers for *A.*'s benefit, it must, until the contrary shown, be presumed that it was brought by him and by his authority, and if so, he became and remained still liable to the attorney employed to bring it, nothing having been done to deprive the attorney of his rights to recover costs from him; he was therefore improperly admitted to give evidence, and a *venire de novo* was awarded. *Bell v. Smith*, 5 B. & C. 188.

(*n*) *Forrester v. Pigou*, 1 M. & S. 9.

(*o*) See tit. *BANKRUPT, Competency*. In an action for taking usurious interest on a loan to a bankrupt, it was held that he was not a competent witness for the plaintiff, not having obtained his certificate; although the defendant had proved the loan under the commission, and although the bankrupt offered to release his claims under the bankruptcy. *Masters v. Drayton*, 2 T. R. 496. See tit. *WITNESS, Creditor*. Where the plaintiff sued two on a joint-contract, and one pleaded his bankruptcy and certificate, it was held, that by suing both, the plaintiff had elected not to prove the debt under the separate commission, and that a verdict in that action could not affect the interest of the bankrupt's creditors, one of whom was therefore a competent witness to prove the joint contract. *Blannin v. Taylor*, 1 Gow, 190.

(*p*) See tit. *LEGATEE*.

(*q*) A co-partner or party jointly interested in the subject of the suit has usually a direct interest in the particular subject, as contradistinguished from a mere liability to contribution. This seems to be generally true where he is jointly interested with the plaintiff in the subject of the suit; for he would be jointly entitled to the fruit of the proceeding when reduced into possession, whether it were money or goods. And so it seems he has where jointly interested with the defendant in any specific property sought to be recovered. In an action on a contract, a general partner, liable as such, would also have such a direct interest; for the effect of a judgment and execution for the plaintiff would

the enjoyment of an interest in possession (*r*); or place him in the immediate possession of a right (*s*); or increase the value of his property by getting rid of an incumbrance (*t*); or, in short, wherever the direct effect of the executed judgment, as contradistinguished from its efficacy in establishing or evidencing any other right or claim, or for any other collateral purpose, would be to produce some benefit, or work some prejudice to the proposed witness.

2dly. Where the witness is so situated that a legal right or liability, or discharge from liability (*u*), would immediately result (*x*):

Right to share, or liability to contribute.

be to diminish the partnership funds. In the case of a joint interest with the defendant merely in the particular contract sued upon, the joint contractor would be interested by reason of *liability* to contribute to the damages and costs. In this case, the late statute would, as it seems, restore competency. One interested in enlarging the funds of a building society, in which he was originally a shareholder, and afterwards secretary, is not a competent witness to enlarge the funds of the society. *Rigby v. Waltheu*, 5 Dowl. P. C. 527. Where by agreement sums recovered are to go to the common funds of a society, no member is a competent witness for any other, although the action be brought on the party's own behalf, and he alone is liable to the attorney for costs. *Planché v. Braham*, 8 Carr. & P. 68.

(*r*) A tenant in possession is incompetent to support his landlord's title. *Doe d. Foster v. Williams*, Cowp. 621; *Doe v. Wilde*, 5 Taunt. 183; *Doe v. Bingham*, 4 B. & Ald. 672; 6 Bing. 304. But in an action by landlord and tenant, the lessor paramount may prove whether the premises were first demised to the landlord or another. *Bell v. Harwood*, 3 T. R. 308. For his possession is not affected by the result. Where the issue in trespass to land was whether the plaintiff, or a party under whom the defendant claimed, was entitled, it was held that such party was a competent witness for the defendant, for the verdict would not change the possession. *Rees v. Walters*, 2 M. & W. 527.

(*s*) On an indictment on the stat. 21

J. 1, c. 15, or 8 H. 6, c. 9, which authorizes justices to give possession of lands entered by force, or held by force, to the tenant; a tenant whose land has been forcibly entered is not a competent witness. *R. v. Williams*, 9 B. & C. 549. Ejectment by tenant in tail to try the validity of a common recovery, the remainder-man after the tenant in tail is incompetent to give evidence for him; the effect of the executed judgment on a verdict for the tenant in tail would be to put him in possession as of his former right, and to give the witness a vested interest in the remainder. *Doe v. Tyler*, 6 Bing. 390. See also *Gully v. The Bishop of Exeter*, 5 Bing. 171.

(*t*) See *Rhodes v. Ainsworth*, 2 Starkie's C. 215; 1 B. & Ald. 87; where it was held that the witness, being the owner of land, was incompetent to disprove the liability to pay in respect of that land to the repairs of a chapel, although the land was in the possession of a lessee, who was bound to pay his rent without deduction, and although he neither resided nor was rated in the district, for he had an immediate interest in removing a permanent charge. See below as to the cases decided under the st. 54 G. 3, c. 170.

(*u*) *Bland v. Ansley*, 2 N. R. 331; where it was held, that in an action against the sheriff for seizing the goods of *A*. under an execution against *B.*, the latter was not a competent witness to show that the goods were not *A.*'s under an assignment from him; for the effect of his testimony would be to pay his own debt with the plaintiff's goods. Note, that the witness had

(*x*) As to this class, see the late st. 3 & 4 W. 4, c. 42, s. 26.

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As where the witness has indemnified a party against the result generally (*y*), or being called for the defendant in ejectment, would be liable to an action for mesne profits (*z*), in case the plaintiff succeeded; or be bail for the defendant (*a*); or has deposited in the hands of the sheriff a sum of money in lieu of bail (*b*); or be surety in a replevin bond (*c*); or has entered into any contract, by which a benefit is to accrue if the result be in favour of his party (*d*); or a loss if he fail. So where the witness is a co-partner with the defendant in the subject-matter of the suit, and would be liable to contribution in case the defendant failed in his defence (*e*). And as a co-partner, by reason of his liability

had sold the plaintiff a house in which the goods were, and whether the goods were sold or not was in dispute. In replevin by an under-tenant against a landlord, who, towards discharging the rent due from his tenant, distrained as bailiff of his tenant for the amount of rent due from the under-tenant to the tenant; it was held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant. *Upton v. Curtis*, 1 Bing. 210.

(*y*) See note (*n*), p. 113.

(*c*) The witness, a tenant in possession of the land, who had been served with a copy of the declaration, is incompetent to be a witness for the defendant in ejectment. *Doe v. Preece*, 1 Tyr. 410; *Doe v. Williams*, Cowp. 621; *Bourne v. Turner*, 1 Str. 632.

(*a*) 1 T. R. 164, *Bayley v. Hole*, 3 Carr. & P. 500. *Piesly v. Von Esch*, 2 Esp. C. 605. *Pearcy v. Fleming*, 5 Carr. & P. C. 503.

(*b*) *Lacón v. Higgin*, 3 Starkie's C. 182. The same objection applies to the wife of the bail. *Cornish v. Pugh*, 8 D. & Ry. 65. Mood. & M. C. 289.

(*c*) *Baily v. Baily*, 1 Bing. 92.

(*d*) As if a plaintiff agree that if he recover the lands, the witness shall have a lease; Gilb. Ev. 108. So where the witness, in case the plaintiff failed, was to pay a sum of money, but if he succeeded was to retain it. *Fotheringham v. Greenwood*, 1 Stra. 129.

(*e*) See the cases which fall within this class, below, tit. JOINT INTEREST. One

who admits himself to be a contractor is not a competent witness for the defendant; for although it might be against his interest to admit such liability in respect of contribution, yet he has a more immediate interest to defeat the action or reduce the damages. *Hall v. Rex*, 6 Bing. 181, and 3 M. & P. 273; and see *Simons v. Smith*, 1 Ry. & M. 29; *Cheyne v. Koop*, 4 Esp. C. 112.

In an action for goods sold, the defence was, that they were sold to the defendant and another, his partner, in part payment of a debt due from the plaintiff to the partnership; held, that such partner was an incompetent witness, as being liable to contribution in respect of plaintiff's demand. *Evans v. Yeatherd*, 2 Bing. 133.

So where a co-defendant in *assumpsit* has let judgment go by default. *Brown v. Fox*, cited by Dallas, J., 8 Taunt. 141; and see the observations in *Mant v. Mainwaring*, 8 Taunt. 139; *infra*, Vol. II. tit. PARTIES.

Where two partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a non-pros. was entered as to him; it was held, that as since the 49 Geo. 3, c. 121, s. 8, the solvent partner, after payment of the partnership debt, might prove against his insolvent partner's estate, and that the certificate, therefore, would be a bar to any action for contribution, the bankrupt having released his surplus effects, was an admissible witness for him. *Afflato v. Fourdrinier*, 6 Bing. 306. And see *Moody v. King & Porter*, 2 B. & C. 558.

to contribution, would not be a competent witness for the defendant, to whom, on a verdict against him, he would be liable to contribute, he is, on the other hand, a competent witness for the plaintiff in an action against the co-partner.

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A co-partner in a company, whether proved to be such by examination on the *voire dire* (*d*) or by independent evidence (*e*), is a competent witness in an action of assumpsit to prove the liability of the defendant as a co-partner; for being a co-partner he is liable for his contributory share of the damages and costs; and if the defendant were not in fact a partner, he would be entitled to recover from the firm the sum recovered from him, as money paid to their use (*f*). Yet if the witness, being a co-partner,

(*d*) *Blackett v. Weir*, 5 B. & C. 385; *Yorke v. Blott*, 5 M. & S. 71; *Hall v. Curzon*, 9 B. & C. 646; *Fawcett v. Westhall*, 2 C. & P. 305. Where creditors of a bankrupt agreed to contribute to the expense of watching a commission of bankrupt, in order to prevent fraudulent proofs, rateably in proportion to their respective claims; it was held that one of the contributors, who had paid his own proportion to the solicitor retained, was a competent witness for the latter, in a suit to recover his quota of the expense from another creditor. *Taylor v. Cohen*, 12 Moore, 219.

(*e*) *Hall v. Curzon*, 9 B. & C. 646. Lord Tenterden, C.J., in giving judgment, assimilated the case to that of a cotrespasser.

(*f*) Per Holroyd, J., in *Blackett v. Weir*, 5 B. & C. 386. A creditor of the firm of *A. & Co.* sues *B.*, supposing him to be one of the firm. Having proved the debt as against *A. & Co.*, he adduces evidence to show that *B.* is a member of the firm, and has a verdict, judgment, and execution against *B.* It is assumed in the foregoing decision, that *B.*, not being in fact a member of the firm of *A. & Co.*, can recover over against the firm, and if so, one of the firm would, of course, gain nothing in obtaining a verdict against *B.*, for he would ultimately be liable to his share of the debt and costs in the action against *B.*, and could not by his testimony reduce his contributory share by enlarging the number of contributors. It may perhaps be open to doubt whether *B.*, a stranger to *A. & Co.*,

could recover against them the amount recovered from him, including costs as well as damages. The costs may in fact be attributable to the mistake of the creditor in suing the wrong party, and there seems to be some difficulty in holding that *A. & Co.*, who might, if sued, have paid the amount, should be liable to the costs of an action against a stranger. It is true that in the principal case, the witness being one of the firm of *A. & Co.*, swears that *B.*, the defendant, is a member; but this ought not to affect his partners, unless privy to the fraud. Assuming the action to be maintainable, it may be questionable whether the same principle would not extend to cases where the witness having bought goods in his own name, is called to prove that the defendant is either solely or jointly liable. See *Macbrain v. Fortune*, 3 Camp. 317, & *Ripley v. Thompson*, 12 Moore, 55, for there also it might be urged that the party wrongfully charged would have his remedy over against the witness. Another question is as to the effect of the late stat. 3 & 4 W. 4, c. 42. See below, tit. JOINT INTEREST. The interest of a witness who admits his own liability to a portion, *e.g.* one half, but who insists that the defendant is liable jointly with him, depends, so far as the amount is concerned, on the difference between the amount of the costs and the debt claimed; in respect of costs, admitting as he does his own liability, he is interested in defeating the plaintiff; he is interested, on the other hand, in causing the defendant to contribute to the debt;

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has let judgment go by default, he would not be a competent witness for the plaintiff; for, being himself liable, he is interested in rendering the co-defendants liable to contribution, of which liability the record would be evidence (*g*). Here, however, the record would be evidence for him to prove a *fact*, that is, the joint liability of the defendants (*h*).

In cases falling within this description, it is not sufficient that the party objecting to the testimony should suggest that the witness is interested by reason of his privity with the party; the fact, if not admitted by the party who calls the witness, must be proved either by the examination of the witness on the *voire dire*, or by independent evidence (*i*).

It seems that in general, where a witness is *primâ facie* liable to the plaintiff in respect of the cause of action for which he sues, he is not a competent witness for the plaintiff to prove the defendant's liability. For his evidence tends to produce payment or satisfaction to the plaintiff at another's expense; and the proceeding and recovering against another would afford strong if not conclusive evidence against the plaintiff in an action against the witness.

Thus it has been held that where the witness is *primâ facie* liable to the vendor of goods which he has purchased in his own name, he is not a competent witness for the vendor against a third person to prove that the defendant is either solely (*k*) or jointly (*l*) liable for

and if the debt were less than the costs, he would still be interested in favour of the defendant.

(*g*) *Brown v. Brown*, 4 Taunt. 752. See the case of *Taylor v. Cohen*, 12 Moore, 219; where Best, C. J., distinguished the case of *Brown v. Brown* from that of *Hudson v. Robinson*, on the ground that in the latter case the witness could in no event be interested in the result of the suit. And it may be observed, that in the former case the witness admits his own liability, and consequently admits an interest to make another contribute: the defendant is either jointly liable with him or he is not; if he be jointly liable, then the witness has an interest in defeating the action to get rid of his share of the costs; but if the defendant be not jointly liable, the witness has an interest in causing the defendant to contribute to the debt.

(*k*) *Abbott, C. J.*, in the case of *Blackett v. Weir*, 5 B. & C. 287, observes that this is founded on the rule that no party to the record can be examined.

(*i*) *Birt v. Hood*, 2 Esp. C. 20; where, in an action for goods sold and delivered, a witness being called to prove that the trade in respect of which the goods were supplied was carried on not by the defendant but by the witness, the plaintiff admitted that the witness carried on the business, but insisted that the defendant was partner with him: but Eyre, C. J., overruled the objection, saying, that as the plaintiff had chosen to proceed against the defendant solely, he should not be allowed, by merely suggesting the existence of a partnership between the defendant and the witness, to deprive the former of the benefit of his testimony.

(*k*) *Macbrain v. Fortune*, 3 Camp. 317, Vol. II. tit. VENDOR & VENDEE, 895.

(*l*) Where *G.*, a party to whom goods were originally sold in his own name, having become insolvent, the action was brought against the defendants, who were in partnership with *G.*, it was held that he was an incompetent witness on the part of the plaintiff, to show the liability of

the goods; for in such case the witness has a direct interest in causing another either to pay or contribute to the payment of the debt (*m*). So where a witness called by the defendant has undertaken to indemnify him against the whole or part of the damages or costs (*n*). It is immaterial whether the obligation to indemnify be express or be implied from the circumstances (*o*). Thus a principal is not a competent witness for his surety (*p*).

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the defendants, without a release, for he had a direct interest to render others liable as well as himself. *Ripley v. Thompson*, 12 Moore, 55.

(*m*) So in an action for use and occupation, where a witness was called who stated that he had not been released from his tenancy, being asked whether he had not given up the premises to the defendant, it was objected that he was interested in fixing the defendant, and it was held that he was incompetent, for if the plaintiff succeeded in getting the amount he claimed from the defendant, that would put an end to the plaintiff's claim for rent for the time for which he sought to recover it in that action. *Hodson v. Marshall*, 7 C. & P. 16, cor. Lord Denman, C. J. Note that this was subsequent to the stat. 3 & 4 W. 4, c. 42.

(*n*) Where several parishioners at a vestry signed a resolution, approving of law proceedings against surveyors of the highways, and guaranteeing to the plaintiff the legal expenses, held that it was a personal liability, and rendered them incompetent. *Hendebourak v. Langley*, 3 C. & P. 571. One who has jointly with the defendant and by his authority done the act for which or its consequences damages are claimed, is not an incompetent witness for the defendant, in the absence of an agreement to indemnify. Where, in trespass for taking marl, &c. the defendants justified as under a license from the plaintiff to *B.*, one of the defendants, and *J. F.*; in support of which an agreement was proved between the plaintiff and the first defendant, and one *J. F.*, for a surrender to them of "all those brickworks at *S.*" then in the possession of the said plaintiff; upon which the question arose, whether the *locus in quo* were parcel of such brick-works; it was held that, in the absence of any engage-

ment on the part of *J. F.* to indemnify *B.*, he was a competent witness, and that he might be called to explain the agreement by parol evidence, it being ambiguous as to the identity of the brick grounds. *Paddock v. Fradley*, 1 J. & C. 90.

(*o*) Where, in an action by the indorsee against the drawer of a bill, it was attempted to be proved by the acceptor that the bill was accepted in discharge in part of a bill due from him to the drawer, and was indorsed by the latter that he might get it discounted; and that he delivered it to the plaintiff, and told him that if he would get cash for it he might retain out of it the sum which the acceptor owed him, but that he never did get cash for it; it was held that the acceptor was an incompetent witness, because although not interested in the amount of the bill, yet, as to the costs, he would be bound to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds v. Loece*, 8 B. & C. 407. See below, tit. INTEREST.—COSTS; and Vol. II. tit. BILLS OF EXCHANGE.

(*p*) *Secus* where the principal is discharged by his bankruptcy and certificate. *A.* and *B.* having been in partnership, dissolved it on the 14th of July; the dissolution was advertised on the 17th; on the 16th a bill was drawn in the names of *A.* and *B.*, which was accepted and paid by *C.* without consideration; *C.* afterwards sued *A.* and *B.* for money lent; *A.* pleaded his bankruptcy and certificate; *B.* *non assumpsit*; a *not. pros.* was entered as to *A.*: held that he was a competent witness for *B.* to prove that *C.* accepted the bill for his (*A.*'s) accommodation, and not for that of *B.*, for that *B.* was only a surety, and might have proved under *A.*'s commission. *Moo dy v. King*, 2 B. & C. 559; *supra*, 107. See *Townend v. Downing*, 14 East, 565.

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3dy. Where the issue involves any breach of duty, or default, in respect of which the witness would be liable over to the party calling him.

Such a witness, for which ever party called, is interested in protecting himself against the consequences of failure, by procuring a verdict to pass for the party who calls him. Although guilty of misconduct, the record would conclusively show that the party calling him had received no prejudice, so far as that cause was concerned (g). If called for the defendant, he would also be interested in obtaining a verdict for him, and to exclude a record which would be evidence against himself as to the amount of consequential damage in an action afterwards brought against him by his party (r).

This principle comprehends all cases of warranty express or implied. If, on a title turning out to be defective, the witness be bound to indemnify the purchaser against consequences, he is not competent to prove the title in an action against the purchaser under a similar warranty where the issue is upon the title; for the agreement to indemnify against a defect in title, is, so far as the result is concerned, an agreement to indemnify in the particular cause. The witness, although liable for breach of warranty independently of the record, would, if the plaintiff succeeded, be liable to the defendant to the extent of the damages recovered, of which the verdict and judgment would be evidence (s).

(g) It is to be borne in mind that in all cases within this class, where an agent or other party is liable over in respect of some breach of duty, the action is founded on the breach of duty, the failure in the former action is material only as showing consequential damage. Where, therefore, an action is brought by a former plaintiff against one as liable over to him, although he need not prove failure in a former action, it might be material to the defendant to prove that the plaintiff actually succeeded.

(r) If called for the plaintiff, although a verdict for the defendant would not show to what extent the plaintiff had been damnified by a failure attributable to the witness's breach of duty, the record might, perhaps, still be evidence to show that the plaintiff's claim against the defendant was barred.

(s) Where C. had enfeoffed the defendant with a covenant that he was seised in

fee, and the defendant covenanted with the plaintiff for quiet enjoyment, it was held, that in an action on the latter covenant, C. was not competent to negative a prior feoffment to another person, for the effect would be to save him from an action for breach of his own covenant. *Serle v. Serle*, on a trial at a bar, 2 Roll. Ab. 685. But it is otherwise where a vendor has sold the inheritance without any covenant for good title or warranty. *Busby v. Greenslade*, 1 Str. 445. In general the law implies no warranty in the case of a real estate. *Infra*, Vol. II. tit. WARRANTY. It is otherwise in the case of a sale of personal property, in which case any affirmation at the time of sale amounts to a warranty. *Infra*, Vol. II. tit. WARRANTY. And it seems that in general a witness who would be answerable to a vendee, in case the title turned out to be defective, is not a competent witness to prove the title. See tit. VENDOR AND VENDEE, Vol. II.

Numerous authorities (previous to the late statute,) show that in an action against a principal, founded on the negligence of his agent, the latter is not a competent witness for the defendant (t). In Liability over.

and tit. DECREE, 267; and *Robinson v. Anderton*, Peake's C. 94. In the two following cases it was held that a witness was competent to prove title in himself to the property in dispute, although he had sold it to the defendant. Trover for a horse, the defendant proposed to prove that the horse was delivered to *E. F.* by the plaintiff, to secure a debt which he owed to *E. F.*, with authority to sell the horse to pay the debt, and that under this authority *E. F.* sold the horse to the defendant. *E. F.* was called to prove this case, and having been admitted as a witness for the defendant, notwithstanding an objection taken on the ground that he was incompetent to prove his title to sell, the plaintiff obtained a verdict. The objection having been renewed on a motion for a new trial, the Court of C. P. held that the witness was competent, because the record would not be admissible in any other action either for or against *E. F.* *Nix v. Cutting*, 4 Taunt. 18. But although the record would not, in the event of a verdict against the defendant, be evidence to show the fact of title, yet in an action by the defendant against *E. F.* for selling the goods without authority of the owner, it would, it seems, be evidence to prove the measure of damage sustained by the defendant in the former action.

In the case of *Larbaustier v. Clarke*, 1 B. & Ad. 899, the action was for goods sold. The plaintiff proved that one Faircloth and the defendant's son came to the London Docks, and said that the defendant wished to purchase a cask of champagne; the price agreed on was 10*l.*, the wine was afterwards delivered to the defendant. A month afterwards the plaintiffs called on the defendant for payment, when he alleged that he had previously paid Faircloth the money. The proposed defence was, that Faircloth, who was a wine-merchant, had purchased the wine of the plaintiffs, and sold it on his own account to the defendant, and had been paid by the latter; and Faircloth was tendered as a witness to prove these facts.

Lord Tenterden was of opinion, that as Faircloth, in order to induce the defendant to pay him, must have falsely represented himself to that party as the owner of the wine, he was guilty of fraud, and would be answerable to the defendant, not only for the price of the wine, but for the costs accrued in the action. A verdict having been found for the plaintiffs, the Court of King's Bench held that the circumstances did not warrant the assumption that Faircloth had been guilty of fraud or misrepresentation, and that he was therefore a competent witness. The Court, in the above case, considered it to be essential for the purpose of excluding the testimony of the witness, to prove fraud.

In the case of *Baldwin v. Diron*, 2 Mo. & Mal. C. 59, the defendant, in an action on a warranty of a horse, called the party from whom he had bought him under a similar warranty; and on the objection to his competency, but no authority being cited, Lord Tenterden, C. J., said that it would be safer to admit the witness, giving the plaintiff leave to enter a verdict in case the Court should think that he was incompetent. But in the later case of *Biss v. Mountain*, 1 Mood. & R. 59, it was held (by Alderson, B.) in conformity with *Briggs v. Cwick*, 5 Esp. C. 99, that the witness in such a case was incompetent.

(t) In the case of *Green v. The New River Company*, 4 T. R. 589, it was held that the turncock in the employment of the defendants was incompetent to negative a charge of negligence on which the action was founded. The Court in giving judgment decided on the ground that the verdict would, in a subsequent action by the defendants against the witness, be evidence to prove the amount of the damages. Where a pilot was on board who had the control of the ship, it was held that he was not a witness for the owners, in an action on the case against them for an injury by running foul of another vessel, without a release. *Hawkins v. Finlayson*, 3 C. & P. 305. In an action on the case for negligence, in running against the plaintiff's

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So also it has frequently been held that where negligence is imputed to the plaintiff's agent, such as if proved would preclude the plaintiff from recovering, such agent is an incompetent witness for the plaintiff.

In *Morish v. Foote* (x), which was an action for negligently driving a mail-coach against the plaintiff's waggon, his waggoner was held to be incompetent without a release, although he swore

cart with a dray, the servant who drove the cart was held to be incompetent. *Miller v. Falconer*, 1 Camp. 251. In an action against a sheriff for a false return, his officer, being liable to his principal for the consequences of his misconduct, is not a competent witness to show the correctness of the return. *Powell v. Hord*, 2 Lord Ray. 1411; 1 Str. 650. Even although the officer has received an indemnity from the execution creditor, or had not employed the attorney for the defence, for his liability to the sheriff is certain, and he may not get paid on his indemnity. Per Lord Tenterden, in *Whitehouse v. Atkinson*, 3 Carr. & P. 344. The same learned Judge is reported to have held that the rule did not extend to a witness not immediately liable to the sheriff, but liable to his officer, and that the interest was too remote. *Clarke v. Lucas*, Ry. & M. 32. The case, however, seems to fall directly within the excluding principle. It seems that in such a case the witness, if otherwise incompetent, would not be made competent by the late statute. The sheriff would be able to produce the record against his officer, for being indorsed with the witness's name, it would still be evidence against the officer; and in an action by the officer against the witness, the former, it seems, would be able to recover the damages occasioned by the defendant's misconduct, without resorting to the first record. See *Gevers v. Mainwaring*, Holt's C. 139; *Whitehouse v. Atkinson*, 3 C. & P. 344; *Field v. Mitchell*, 6 Esp. C. 73. *Clarke v. Lucas*, 1 Ry. & M. C. 32. *Kerrison v. Coatsworth*, 1 Carr. & P. C. 445, and the cases cited below.

(u) See *Neale v. Wylie*, 3 B. & C. 533.

Lewis v. Peake, 7 Taunt. 153. Note, that in the latter case the purchaser of a horse on a warranty, resold him on a similar warranty, and having offered the defence to his warrantor, who did not interfere, was held to be entitled to costs. The rule seems to be different where the plaintiff brings an unfounded action, and is defeated by reason of misconduct on the part of his agent. See 1 Bing. 688.

(x) 2 Moore, 508. In the case of *Cuthbert v. Gostling*, 3 Camp. 518, issue was taken on a replication of excess, to a plea of licence in trespass for breaking a wall of the plaintiff's house. The trespasses complained of had been committed in repairing the defendant's house. The defence was, that the plaintiff having given leave to do what was necessary for repairing, nothing more than was necessary had been done; and to prove this, the evidence of the workmen employed was admitted on behalf of the defendant; Lord Ellenborough observing, that it by no means followed that the witnesses would be liable to the defendant if the plaintiff had a verdict; and that the case was very different from an action for negligence in driving against carriages or running down ships; for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master, and they have a direct interest to defeat the action. Here it is to be remarked that there was no evidence to show that the agents had done anything beyond the scope of the master's direction, and consequently it did not appear that in the event of a recovery against him he would be entitled to recover over from them. See also *Green v. The New River Company*.

that he left sufficient room for the defendant's mail, and although the jury found by their verdict that he was not to blame. Liability over.

In the case of *Rothero v. Elton* (y), in an action on a policy of insurance on goods on board a ship, the question was, whether the ship was seaworthy; and it was held that the owner of the vessel was not a competent witness for the plaintiff to prove the affirmative, because he was interested in the event of the cause; for, if the plaintiff failed, he would have been entitled to recover against the witness, on an implied warranty that the ship was staunch. Again, in an action on a policy of insurance on goods, the captain of the vessel has not in the abstract any interest either in the immediate result of the cause or in the record; and if the question merely be, what was the original destination of the ship, he would be a competent witness for the plaintiff, to show that he acted under his direction. But if the question turned upon a deviation, he would have been incompetent to prove that he had not been guilty of a deviation; for if the plaintiff had failed, the witness would have been responsible to him for the consequences of such deviation, and he would then have laboured under an interest in the event of the suit (z).

The decision in *Morish v. Foote* has been recognised in several later cases (a).

In all cases within this general class, in order to incapacitate the witness, the interest under which he labours must be established by evidence; no presumption will be made that he has acted dishonestly or improperly for the purpose of founding an objection to his competency (b). But if the witness be shown to have acted under any duty to the defendant, and the question is, whether he performed that duty, or was guilty of a breach of duty, he is not competent. As where a witness is called for the defendant, the drawer of a bill, to prove that he having received the bill from the defendant, to get it discounted, had delivered it to the plaintiff for that purpose, the question being whether he had so delivered it, or in payment for goods bought by him of the plaintiff (c). So where in an action by

(y) Peake's C. 84, cor. Lord Kenyon.

(z) *De Symonds v. De la Cour*, 2 N. R. 374; and see the cases above cited.

(a) *Wake v. Locke*, 5 C. & P. by Lord Denman, C. J. *Sharman v. Barnes*, 1 Mood. & R. 69.

(b) *Larbalestier v. Clarke*, 1 B. & Ad. 809, *supra*.

(c) *Harman v. Loshrey*, Holt's C. 390. It is now well established that a person who has received money due from a de-

fendant to a plaintiff is not a competent witness for the defendant to prove that he received the money as agent of the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant not only the money received, but also the costs of the action, in case the plaintiff recovered. Per Littledale, J., in the case of *Larbalestier v. Clarke*. That learned Judge said also that he regretted

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an indorsee against the drawer of a bill, a witness having been called by the defendant to prove that the bill had been accepted by him for a debt due from him to the defendant, and had been delivered to him by the defendant to get it discounted, and by the witness to the plaintiff to get cash for it, and the question being whether the witness had so delivered the bill to the plaintiff, or had delivered it in discharge of his own debt to the plaintiff (*d*), he was held to be incompetent.

In those cases it appeared, and in cases falling within the same principle it is necessary, for the purpose of excluding the witness, that it should appear, by admission or otherwise, that the proposed witness had some contract or duty to perform, in respect of which, in case of misconduct or default, he would be liable over for damages or costs, if his party failed; for then he has such an interest in representing the fact one way rather than the other, as on the general principle excludes his testimony.

A witness is, it seems, in general competent to defeat an action by proof of title or interest in himself, or of his situation or circumstances, provided he be not subject to any contract or obligation which would make him liable over in case such title or interest were disproved (*e*).

Where the party employed was the actual agent who transacted the business of the principal, he is, as will be seen, competent on the score of necessity (*f*); but although an agent who actually

that such a rule had been established, because in many cases it was extremely difficult to ascertain whether a party so situated would be liable to costs. In order, however, to incapacitate a witness in such a case, it is not necessary to prove what his conduct has in fact been, for that is the question to be tried; it is sufficient to establish the fact that he had a duty to discharge, having received money for a particular purpose; and then, if the question be whether he so applied, or on the contrary misapplied it, and in the latter case would be liable to the defendant's costs, he is incompetent. It is now well established, that a liability to costs simply, constitutes a preponderating interest sufficient to exclude testimony. *Townend v. Downing*, 14 East, 565; and see Index, tit. Costs.

(*d*) *Edmonds v. Lowe*, 8 B. & C. 409.

(*e*) *Nix v. Cutting*, 4 Taunt. 18. *Ward v. Wilkinson*, 4 B. & Ald. 410.

(*f*) Vide *infra*, tit. AGENT. A journeyman is competent to prove the delivery of

goods. *Adams v. Davis*, 3 Esp. C. 48. So where a clerk or servant has received money, he is a competent witness for the party who paid it. *Matthews v. Haydon*, 2 Esp. C. 509. And per Lord Kenyon (*Ibid.*), it is the constant course at Nisi Prius, *ex necessitate rei*, to admit the evidence of clerks and porters who were alone privy to the receipt of money or the delivery of goods. And see *Theobald v. Treggott*, 11 Mod. 261. So a bookkeeper is a good witness without a release. *Spencer v. Goulding*, Peake's C. 129. And where a carrier who was directed to deliver money to A., delivered it by mistake to B., it was held, that in an action by the employer against B. to recover the money, he was competent without a release. *Barber v. Macrae*, 3 Camp. 144; B. N. P. 289. And see *Ilderton v. Atkinson*, 7 T. R. 480; *Evans v. Williams*, 7 T. R. 481, n.; Vol. II. 894. But a debtor to the plaintiff is not (it has been held) competent to prove that he paid the debt to the de-

executed the business of the principal is, it seems, in all cases competent to prove that he acted according to the directions of his principal (*g*), on the ground of necessity, and because the principal can never maintain an action against his agent for acting according to his own directions, whatever may be the result of the cause (*h*), yet if the cause depend upon the question whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of the principal, and in respect of which he would be liable over to the principal if he failed in the action, the agent is not competent without a release (*i*), or an indorsement according to the statute.

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over.

The objection ceases to operate where the party who would otherwise have been entitled to recover over against the witness, has by any act precluded himself from recovering (*k*).

4thly. A witness is incompetent where the record would, if his party succeeded, be evidence of some matter of fact to entitle him to a legal advantage, or repel a legal liability (*l*). It is observable

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defendant, the servant of the plaintiff, for his master. *Theobald v. Treggott*, 11 Mod. 261, cor. Holt, C. J.; for he swears in his own discharge.

(*g*) See note (*f*).

(*h*) *Morish v. Foote*. See the observations of Mansfield, C. J. in *De Symonds v. De la Cour*, 2 N. R. 374.

(*i*) *Infra*, INTEREST — AGENT. See *Rothero v. Elton*, Peake's C. 84. *Miller v. Falconer*, 1 Camp. 251.

(*k*) In an action against a sheriff for a false return of *nulla bona*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them, such person is admissible to prove that they were not the property of the debtor against whom the execution had issued; because the sheriff cannot maintain an action against him (the witness) for the rescue, after having made such a return; and as to all other persons claiming the goods, the verdict would be *res inter alios acta*; and therefore could not be used to affect their rights in any proceeding against the witness. *Thomas v. Pearce*, 5 Price, 547.

(*l*) See *Bent v. Baker*, 3 T. R. 27. *Smith v. Prager*, 7 T. R. 60. *Abraham v. Bunn*, 4 Burr. 2251. A copyholder is incompetent to prove a customary right in

the manor for copyholders to take timber for repairs without assignment of the lord. *Lady de Fleming v. Simpson*, 2 M. & R. 164. One who has acted in violation of a custom is incompetent to disprove it. *Carpenters' Company v. Hayward*, Dougl. 374. On an action on a custom to have the second-best fish in every boat landed out of S. Cove, a party representing himself to be a fisherman frequenting the coast, was before the late statute held to be incompetent. *Lord Falmouth v. George*, 5 Bing. 286. Where the defendant claimed to be entitled as heir-at-law of his father, and called his mother to prove a scisin in his father, it was held that her being entitled to dower if the scisin were established did not render her incompetent, as the judgment in the action would be no evidence of the scisin, and she would be equally entitled to dower whether the lands were in the hands of the defendant or of the lessor of plaintiff. *Doe d. Nightingale v. Maisey*, 1 B. & Ad. 439. In trespass for cutting down furze the defendant claimed an exclusive right of possession; held that the issue between the plaintiff and defendant being confined as to the right of possession of the *locus in quo*, and the record not being evidence to affect the rights of parties claiming rights of common over it, they were competent wit-

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that in most if not all the cases already adverted to, where the witness is excluded by reason of his interest in the result, the record would be evidence, where such evidence was necessary, to prove the mere fact that such a verdict had been obtained, or to show the measure of damages, but not to prove the truth of any fact disputed in the cause. Thus the verdict and judgment in an action against a principal for the negligence of his agent, would be admissible in an action by the principal after a verdict against him, to prove the measure of damages, though not to prove the fact of negligence. It is proposed within the present division to consider those cases where the record would be evidence for or against the former witness to prove a matter of fact, in order to acquire a benefit or repel a loss.

The operation of this rule necessarily and obviously depends upon another very important question, namely, in what cases the record in a former proceeding is admissible in evidence (*m*). In general, in all cases depending on the existence of a particular custom, a record establishing that custom is evidence, although the parties are different. Hence it follows that no one is competent to support a custom who would be benefited by the establishment of it, because the record would be evidence for him in case his own right should subsequently be disputed. Accordingly, upon a trial at bar of an issue, whether by the custom of certain manors in Cumberland the lord was entitled, under particular circumstances, to a fine from his tenant-right tenants, the Court would not permit lords, of other tenant-right manors in Cumberland, Westmorland or Northumberland, to give evidence of the right (*n*), nor the tenants of other tenant-right estates there to give evidence against it (*o*).

So where the issue is, whether a custom exists that all the inhabitants of *A.*, or all the tenants of a particular manor, shall have common of pasture in a particular spot, no inhabitant in the one case, or tenant in the other, is competent (*p*) to establish the custom.

Where the question is as to a prescription for a right of common, as appurtenant to the house of *A.*, *B.*, who has a similar house,

nesses for the defendant. *Pearce v. Lodge*, 12 Moore, 50. Where the verdict in ejectment, by an heir-at-law, would only tend to establish the will as to the real property, and would be no evidence in the Ecclesiastical Court upon a question whether it were a good will as to personalty, held that upon the issue of the testator's sanity, the executor (although a creditor of the testator) was a competent witness. *Doe d.*

Wood v. Teage, 5 B. & C. 335; and 8 D. & Ry. 63.

(*m*) See tit. JUDGMENT.

(*n*) *Duke of Somerset v. France*, Str. 654.

(*o*) S. C. Fort. 41.

(*p*) *Hockley v. Lambe*, Lord Raym. 731; per Buller, J. 1 T. R. 302; Per Ld. Ken. C. J. 3 T. R. 33; B. N. P. 283; *Ancombe v. Shore*, 1 Taunt. 26; and

is a competent witness, since the record would be no evidence in support of his prescriptive claim; but if the right in the common were to be claimed as appurtenant by custom to all houses similar to that of *A.*, *B.* would not be a competent witness, because the record would be evidence of his own right (*q*).

Interest in the record.

A member of a corporation is not competent to prove a custom to exclude strangers from trading, part of the penalty imposed by a bye-law made to enforce the custom being due to the corporation (*r*).

It has been held that where the question is, whether several requisites in the aggregate will not confer particular advantages, one who possesses part only of those requisites is still competent, since the decision would not entitle him to a participation in those advantages (*s*). And therefore upon a question, whether to qualify one as a common-council man, it was requisite that he should both be an inhabitant, and also possess a burgage tenure, it was held that one who was an inhabitant, but who had no burgage tenure, was competent to narrow the right, and to confine it to such as had both qualifications (*t*).

Where a witness would by the conviction or acquittal of another discharge himself, he is in general incompetent (*u*). But it seems to be a general rule, that no verdict founded either wholly or partially on the testimony of any witness in a criminal proceeding, can be made use of either for or against him in any other proceed-

Verdict in criminal proceeding.

Vol. II. tit. COMMON. It seems, that in order to exclude a witness, where the verdict depends on a custom which he is interested to support, it is not necessary that the custom should be stated on the record. *Lord Falmouth v. George*, 5 Bing. 286; and see App. Vol. I. 115. A case occurred on the Northern Circuit, where the verdict in an action of trover turned entirely on an alleged custom within a manor for the tenants to cut down wood, and a witness interested in supporting the custom was rejected, although it was insisted that the verdict would not be afterwards evidence for him to support the custom; for it was answered, and the Court of King's Bench afterwards, as I have heard, approved of the decision, that the effect of the verdict to support the custom might be aided by evidence.

(*q*) B. N. P. 283. *John v. Fothergill*, Peake's Ev. Append. 1 T. R. 302. *Harvey v. Collison*, 1 Sel. N. P. 449. So a witness is not competent to establish a modus in

a parish, or to exempt certain articles from the payment of tithes, where he himself would be liable were the claim to prevail. (*Lord Clanricarde v. Lady Denton*, 1 Gwill. 360. *Anscombe v. Shore*, 1 Taunt. 261.) So a witness is not competent to prove a custom in a parish to an away-going crop, where he, as tenant of lands within the parish, would be entitled to the same privilege.

(*r*) *Davis v. Morgan*, 1 Tyrw. 457; and see *Burton v. Hinde*, 5 T. R. 174, and Vol. II. tit. CORPORATION.

(*s*) *Stevenson v. Nevinson*, Str. 583. The Court relied also on the ground of necessity, and said, that he was in effect a witness against himself, by showing that he had no right.

(*t*) *Ib.* For other illustrations of this rule see *Knight v. Birch*, 3 Camp. 521; Vol. II. tit. COMMON.—CORPORATION.—CUSTOM.

(*u*) B. N. P. 288, 9. Gil. Ev. 223.

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ing (*x*); and consequently no objection on that ground can be made to his testimony. Accordingly, upon the trial of an inquisition against the warden of the Fleet, for the escape of *A.*, who was in custody along with *B.* on a joint judgment and execution, issue having been joined on the question whether the defendant had voluntarily permitted the escape, it was held that *B.* was a competent witness for the Crown; for although it was urged that the fact, if true, would entitle *B.* to his discharge, it was answered, that the record in that proceeding would be no evidence for *B.* in any action brought by him for false imprisonment (*y*). So upon the trial on an information against the warden for five escapes, one of the prisoners, whose escape had been permitted, but who had returned, was held to be competent, although he had given a bond to the warden to be a true prisoner (*z*).

A verdict, unless it operate *in rem*, is not admissible against a stranger (*a*), and consequently the probability of a verdict either way does not in other cases exclude his testimony.

In trover.

In an action of trover a third person is a competent witness to defeat the action, by proving property in himself; for the verdict neither alters his right nor would be evidence for or against him in an action to recover against either of the parties to the suit (*b*). The consideration that the record might, under circumstances not proved but only suggested, show the measure of the witness's liability, if liable at all, does not render him incompetent (*c*).

It remains to consider in what cases witnesses otherwise incompetent are restored to competency by the st. 3 & 4 Will. 4, c. 42.

This stat. (s. 26) in order to render the rejection of witnesses on the ground of interest less frequent, enacts, that if any witness shall be objected to as incompetent on the ground that the verdict

(*x*) See the cases, tit. JUDGMENT.

(*y*) *R. v. Huggins*, Fitzg. 80; 1 Barnard, 350.

(*z*) *R. v. Ford*, 2 Salk. 690. But note, the reason given in Salkeld is, that it was a private matter, of which there could be no other evidence. In another report of this case the witness is stated to have been a bailiff, who had given a bond to the warden for the safe custody of the prisoner.

(*a*) See tit. JUDGMENT. In the case of *The King v. Horton*, 4 Price, 150, it is said to have been ruled at *nisi prius* by the Lord Chief Baron, that a person having entered into a bond with sureties to the Crown, is not an admissible witness in a

scire facias against the surety, to prove that he had not broken the condition, although he had been released by the surety; on the ground that the verdict against the defendant would be evidence against the principal, in a similar proceeding against him. But *quere*, and see tit. JUDGMENT; and *Hart v. Muchnamara* 4 Price, 154.

(*b*) *Ward v. Wilkinson*, 4 B. & B. 410. Per Abbott, C. J.: If a verdict one way could not be given in evidence against a witness, a verdict the other way would not be evidence for him. See also *Nix v. Cutting*, 4 Taunt. 18.

(*c*) *Bunter v. Warre*, 1 B. & C. 689.

or judgment in the action in which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him. Stat. 3 & 4
W. 4, c. 42.

Sec. 27, further enacts, that at the time of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court at the request of either party, and shall be afterwards entered on the record of the judgment, and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict and judgment shall be offered in evidence.

The application of these clauses has been attended with considerable difficulty. The tendency of the earlier decisions has been to confine their operation to a small class of cases; the later decisions are founded on a much larger construction of the statute, and tend to a very wide and extensive operation. These enactments appear to have been founded mainly on the principle of restoring competency by actually removing the interest which would otherwise disqualify the proposed witness. It does not seem to have been meant in any case to admit the testimony of an interested witness in violation of the ordinary principle of exclusion from interest, but, preserving that principle as it stood before, to have been intended to enlarge the limits of available evidence by the actual removal of interests which previously impeded its reception. This is proposed to be done by silencing the record in certain cases, and so removing any interest under which the witness might otherwise labour either to procure a verdict and judgment, which would be evidence for him, or to exclude a verdict and judgment, which would be evidence against him. Consistently with this principle, it seems that it was not intended to restore competency in any case where, although the record were silenced, the witness would still have an interest independently of the use of the record as evidence in some other proceeding resulting as a consequence from the verdict and judgment.

Stat. 3 & 4
W. 4, c. 42.

There are, however, two modes in which a record may be used for or against a witness, according to the nature of the proceeding. A record may either be usable, as establishing a right or liability by virtue of its legal operation, or may operate simply as evidence of some matter of fact. And the interest of the witness may depend as much, and indeed more frequently depends on the former than on the latter effect. Are these enactments then to be considered as extending indifferently to both cases? The terms used, "*would be admissible in evidence*, for or against him," in their natural sense, would seem to indicate the intention to limit the enactments to cases where the record could be used simply as evidence; but the principle on which they are founded tends to a larger construction, and it will be seen that such a construction has in a late case been adopted (*d*). Whilst an advantage may be supposed to be gained by the less frequent exclusion of evidence by the adoption of the larger construction, there is nothing unjust or unreasonable in obliging the party who wishes to avail himself of the testimony of a witness, who would otherwise be excluded by interest, to divest him of that interest, although at some sacrifice to himself. It is observable that if these late provisions were to be construed to extend to those cases only where the record could be used as mere evidence, their operation would be limited principally to cases within the third and fourth of the above-mentioned classes, but that according to the larger construction they would embrace, if not the whole, the greater part of those within the second class.

The decisions upon the late enactments will now be referred to. It seems to have been considered from the first that the statute always restores competency in cases where the record would be evidence as to a matter of fact, *e. g.* a custom (*e*), in which the witness has an interest (*f*). But although the interest in such cases has been usually regarded as an interest in the record, it is to be recollected that before the late statute it was not necessary to distinguish between an interest in the record and an interest in its effect. And it may be questionable whether in many of those cases the witness has not an interest in the effect of the record independently of any use to be made of it by the witness as evidence. For although the witness interested in the establishment of the custom could not use the record as evidence, the indorsement would not prevent another party interested in the same custom from using it in evidence, and the record would be equally available to establish

(*d*) *Faith v. McIntyre*, 7 C. & P. 44;
cor. Parke, B.

(*e*) *Wilson v. Fryer*, and *Stuart v. Barnes*, cited below.

(*f*) These cases constitute the fourth class.

Stat. 3 & 4
W. 4, c. 42.

a general custom, whether it were used by the witness or any other person. It may also be observed, that the natural effect of a verdict and judgment in favour of the custom, would be to continue the uses according to the custom, which would, independently of the record, be evidence afterwards to support the custom.

Upon the question whether the landowners in Wharton had a right of cutting wood in Scart Wood, it was ruled that a witness was competent to support the custom by his evidence, although he had land in the township of Wharton (*g*).

The statute does not apply where the issue is directed by a court of equity, for in such a case the witness, notwithstanding the statute, would be able to take advantage of a decree founded on the verdict, which would not bear the indorsement required by the statute.

In the case of *Stuart v. Barnes* (*h*), an issue had been directed by a court of equity to try whether the sum of 1*l.* 19*s.* 11*d.* was payable for tithe, in respect of a district alleged to be the district of St. Nicholas. For the plaintiffs, who had to prove the affirmative, Bowes was called, who admitted on the *voire dire* that he had lands within the district. It was objected that he was incompetent, first, because the statute did not apply to a case where an issue was directed by a court of equity, and where a decree might be made of which he might avail himself; secondly, that the objection was not merely that he was interested in the record, but in the fact, for the destruction of the modus would be followed by payment of tithe in kind, by which the witness would be prevented from setting up the modus. Alderson, B., said that he had considered the first point, and consulted some of the Judges on the subject, who were of opinion that the witness was incompetent; he said that he was also of opinion that the second objection was a valid one, and that the witness had a direct interest, independently of the decree, in procuring a verdict for the plaintiffs.

Although an objection that the witness is interested in the record be capable of removal by an indorsement made pursuant to the 27th clause, the witness is still incompetent, if he labours under any interest independently of the record (*i*).

A difference of opinion has prevailed upon the question whether the statute restores competency in some cases which fall within the third predicament above mentioned. In an action for damage to the plaintiff's house by so improperly digging a cellar that the plaintiff's wall sunk, a very learned Judge is reported to have held (*h*), that the

(*g*) *Wilson v. Fryer*, Lancaster Summer Assizes, 1834, cor. Gurney, B., and see the case of *Stuart v. Barnes*, cited below.

(*h*) York Spring Assizes, 1835, cor. Alderson B.; M. S. and 1 M. & R. 472.

(*i*) *Stuart v. Barnes*, M. S.

(*k*) *Mitchell v. Hunt*, 6 C. & P. 351, cor. Patteson, J.

Stat. 3 & 4
W. 4, c. 42.

agent employed by the defendant was not rendered a competent witness for the defendant by the statute, and that the statute was not intended to apply to such cases. The same learned Judge is also stated to have held (*l*), that a carrier's servant was not a competent witness for his master, without a release, to disprove negligence. A contrary doctrine has, however, been frequently laid down, particularly by Mr. Baron Parke (*m*), and has been confirmed by the late decision in the case of *Yeomans v. Legh* (*n*).

It has been intimated that, although in action against a defendant for the alleged negligence of his agent, the agent would be restored to competency by an indorsement on the record, it would be otherwise where negligence was imputed to an agent called by the plaintiff. For it is said, although the plaintiff failed, he might still recover against the witness, independently of the record. But it is to be observed, that the defendant also may maintain a similar action independently of the record, for the cause of action is completed by the witness's breach of contract or duty; the liability to an action which could not otherwise have been maintained, or the inability to recover from another that which the principal would have been entitled to recover, is but consequential damage. In either case, the witness is interested in protecting himself against his own liability to such consequential damage. In the case of such a witness called for a defendant, he may effect this object by excluding a verdict against the defendant, which would afford a measure of consequential damage against himself; and *further* than this, he has an interest in procuring a verdict for

(*l*) *Harrington v. Caswell*, 6 C. & P. 352. The same point was also ruled in — *v. Taplin*, K. B., first sitting after Easter Term, 1834; Leg. Ex. Vol. III. 244.

In trespass for taking goods, plea property in *M. N.*, by whose command defendant took the goods. *M. N.* was offered as a witness to prove property his own, but was held to be incompetent, because he would be liable to defendant in case plaintiff succeeded for damages and costs; and an indorsement would make no difference, because defendant would still be entitled to recover his own costs. Cor. Patteson, J. *Green v. Warburton*, 2 Mood. & R. 105; see also *Stanley v. Jobson*, ib. 103. But in the case of *Creevey v. Bowman*, 1 Mood. & R. 468, it was held that a party under whom the defendant justified in an action of trespass, was a competent witness for the defendant since the statute.

In an action against a surety for non-performance of an agreement with a money-club to pay subscriptions, the principal it was held was not a competent witness for the defendant; for if the defendant failed, witness would be liable to defendant's own costs, and these are independent of the record.

(*m*) *Pickles v. Hollings*, 1 Mood. & R. 468, and *Creevey v. Bowman*, ibid. 406. In the former of these that learned Judge observed, when the contradictory opinions were cited, that he had always ruled differently, and that his ruling had never been questioned, and that the statute would be frittered away by a contrary construction.

(*n*) 2 M. & W. 419. See Appendix.

the defendant, which would exclude him from alleging that the agent's negligence had rendered him liable to any claim on the part of the plaintiff. He thus excludes that which would have been evidence against him, and procures that which protects him. When the agent is called for the plaintiff, he also is interested in protecting himself against his liability to consequential damage. He may effect this by procuring a verdict for the plaintiff, which would preclude him from attributing to the witness his own inability to recover what he otherwise might have recovered from another in consequence of the witness's breach of duty. He is also interested in excluding a verdict against the plaintiff, which the latter might use in conjunction with other evidence to show that his failure was attributable to the witness's breach of duty. It seems, therefore, that in the one case as well as the other such a witness has an interest in the record. The witness's interest in such a case consists in obtaining protection against a claim to consequential damages: the result of the plaintiff's action is either material to the witness's protection, or it is not; if immaterial, it cannot exclude the witness; if material, it can only be made so by means of the record (o).

A further and very important operation has been given to this statute by construing it to extend to instances where the evidence tends not merely to procure or exclude a verdict which would be evidence for or against the witness, but would actually create or exclude a legal liability. This seems to be contrary to the construction of the Act first adopted. In an early case it was held, that in an action on a guaranty the party guaranteed was not a competent witness for the party who gave the guaranty, in an action upon it, because he would be liable to the defendant for the costs (p). And in action on a bill of exchange accepted for the accommodation of the drawer, it was held also that the witness was not made competent by the statute (q). But in a later case (r), Mr. Baron Parke ruled that the drawer of a bill accepted for his (the drawer's) accommodation, was a competent witness for the acceptor in an action

Stat. 3 & 4
W. 4, c. 42.

(o) But in the case of *Harden v. Copley*, 6 Carr. & P. C. 664, on an action by the plaintiff for an injury to his horse by the negligent driving of the defendant's servant, the plaintiff called the servant who had the care of his horse at the time of the accident. Lord Denman seems to have doubted whether the witness would be made competent by the statute without a release.

(p) *Braithwaite v. Coleman*, Hertf. Spring Assizes, 1834. Cor. Lord Lyndhurst, 2 Harr. Ind. 1047.

(q) *Burgess v. Cuthill*, 1 Mood. & R. 315; 6 C. & P. 282.

(r) *Faith v. M'Intyre*, 7 Carr. & P. 44. See as to accommodation bills, tit. BILLS OF EXCHANGE. *Lewis v. Peake*, 7 Taunt. 153. *Neale v. Wylie*, 3 B. & C. 583.

Stat. 3 & 4 against the latter. The case of *Braithwaite v. Colman* was cited, W. 4, c. 42. but the learned Judge said he thought that by an indorsement of the witness's name on the postea, he would be rendered competent, for he could not be made liable to the costs of that action but by means of the verdict and judgment, which could not, in consequence, of the indorsement, be used against him, and to the amount of the bill he was liable at all events. The testimony was accordingly received, and the defendant had a verdict. This authority, expressly over-ruling a former one, at a time when the construction of the statute had undergone much discussion, is of great importance. The decision is expressly founded on reasons which show that the operation of the statute is not limited to cases where the record might be regarded as *mere evidence*, but extends to those where an actual right would be created, or (by parity of reason) defeated by the verdict and judgment.

The same principle which would restore the competency of a witness who would be liable over to the party calling him, on proof of a breach of duty involved in the issue, would, it seems, also operate in the case of any other direct or implied indemnity as to damages or costs; for the interest of the witness in the former case is founded wholly on an implied engagement to indemnify the party calling him; and it can make no difference in principle or according to the authorities, whether the obligation to indemnify be direct or indirect, express or implied.

The operation of the statute, according to the later construction given to it, seems to embrace all cases where the verdict and judgment could be used by or against the witness, either as evidence or to establish any right, or to discharge him from any liability; and where it would be necessary to use the record for that purpose; for in all such cases the record would be effectually silenced by an indorsement; and as neither the existence of the action nor the result could be proved but by the record, the witness's interest would be as much extinguished as if no such proceeding had taken place(s).

(s) It may be proper, however, to suggest whether, to warrant this large construction, it would not be necessary to construe the words "shall not be admissible in evidence," as extending to the production of the record in court upon a plea of *nul tiel record*.

These new provisions may be attended with this singular effect, that a party, in order to avail himself of them, may be obliged to plead directly contrary to the

fact, that there is no record of a verdict and judgment, which does, in fact, exist. Should the construction which seems to be warranted by the latest authority be adopted, the proper course might be to allege, in answer to the allegation of a record, that the witness was called by the party, and that the names of the witness and party were endorsed on the record according to the statute.

In a case decided since the statute, it was held that a witness *primâ facie* liable to the plaintiff's claim, was not a competent witness for the plaintiff to prove that the defendant was liable, because he had a direct interest in causing another to pay the debt (t). It is observable, that in such a case the witness's interest either depends on the consideration that the debt will be satisfied by an executed judgment, or that the record will operate against the plaintiff by way of evidence to show that the defendant in the former action, and not the witness, was the real debtor; in either case, however, the record would be essential to the defence, and would, it seems, be excluded by an indorsement according to the statute.

Where the incompetency of a party jointly liable with the defendant is founded on a liability to contribute to the debt and costs in the particular transaction, it should seem that the statute would restore competency; such contribution could not be compelled, except through the record, which would be silenced by the indorsement.

If the interest be of the nature above described, its magnitude is not material, and the objection must prevail, however minute the interest may be (u). The reason seems to be this; a plain and simple rule is absolutely necessary, and if a small degree of interest did not disqualify the witness, it would be impossible to draw a practicable line of distinction.

Magnitude of the interest.

A witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony in any proceeding, whether civil or criminal; for the party had a legal interest in the testimony, of

Time and manner of acquiring the interest.

(t) *Hodson v. Marshall*, 7 C. & P. 16. But note that the learned Judge gave no opinion on the operation of the statute, and the plaintiff elected to be nonsuited.

(u) *Burton v. Hinde*, 5 T. R. 174; 2 Vern. 317. But see the observations of Best, C. J., *Doe v. Tooth*, 3 Y. & J. 19; *Hovill v. Stephenson*, 5 Bing. 497. That learned Judge, to whose opinion the greatest deference is due, especially upon questions connected with evidence, intimated that the exclusion of the testimony of the witness, where the amount of interest is minute, is founded on the consideration, that if the interest be insufficient to influence the testimony of the witness, he will release it, and therefore that the releasing it or not is the true test for determining whether it ought to exclude the evidence. This,

however, is a test applicable in those cases only where the witness himself is capable of releasing the interest; it frequently happens that a release from the party who calls the witness is necessary, and then this test would be inapplicable. The releasing him would not depend on the witness's view of the magnitude of the interest, but on the question whether it was beneficial to the party to purchase his testimony at the expense of releasing the witness; and this would depend wholly on the nature and circumstances of the particular case. Where the party expected to recover 10,000*l.*, it might be expedient to release a witness from a debt of 1,000*l.*, in order to obtain the benefit of his testimony.

Time and
manner of
acquiring
the interest.

which he ought not to be deprived by the mere wanton act of the witness. Accordingly, one who has been witness to a wager, and who afterwards bets on the same point, is a competent witness for the party for whom he is called (*x*). So where a witness of an assault lays a wager that he will convict the defendant, he is still a competent witness for the Crown. And this seems now to be fully established, although it was once held that the witness was disqualified by a voluntary creation of an interest in the event, provided the party interested in his silence did not collude with him (*y*).

But the above decisions are founded on fraud on the part of the witness. If a person who is under no legal obligation to become a witness for either party to a suit, engage *bonâ fide* to pay a debt beforehand upon a condition to be determined by the event of that suit, he becomes interested, and therefore incompetent (*z*).

Neutral
witness.

Where the witness is reduced to a state of neutrality by an equipoise of interest, the objection to his testimony ceases. Where, however, the witness is subject to two conflicting interests, one of which preponderates over the other, the difference is to be considered as an absolute interest which is not countervailed (*a*). Accordingly, in an action for money had and received, a witness is competent to prove that it was paid to him as agent for the plaintiff, since he admits that he owes it to one of the parties, and it is indifferent to him which of them is his creditor (*b*).

So the payee of an accommodation promissory note is competent to show that he indorsed it to the plaintiff before it became due, in payment for goods, for he is liable either to the plaintiff for the goods or to the defendant for the amount of the note (*c*).

(*x*) *Barloio v. Vowell*, Skinn. 586; B. N. P. 190. *George v. Pearce*, cited by Buller, J., 3 T. R. 37. *Bent v. Baker*, 3 T. R. 27; Cowp. 736. *R. v. Fox*, Str. 652.

(*y*) *Rescous v. Williams*, 3 Lev. 152, *Baron v. Bury*, 12 Vin. 24; 2 Vern. 699; Ab. Eq. 224.

(*z*) *Forrester v. Pigou*, 1 M. & S. 9 3 Camp. 380. Where a witness for the plaintiff married the defendant after the service of the subpoena, it was held that she could not be examined by the plaintiff without the defendant's consent. *Pedley v. Wellesley*, 3 C. & P. 558. See also *Townend v. Downing*, 14 East, 565. Where the party himself creates the incapacity, the witness is not competent to

prove even an instrument which he has attested, and proof of his hand-writing is inadmissible. Where after the execution of a charter-party, by agreement between the plaintiff and the attesting witness, the latter was admitted to a share of the profits under the instrument, which he refused to release, it was held, that having become an incompetent witness subsequent to the execution of it by the act of the plaintiff, proof of his hand-writing was inadmissible. *Hovill v. Stephenson*, 5 Bing. 493; and see *Forrester v. Pigou*, 1 M. & S. 9.

(*a*) See Evans's Pothier, tit. *Evidence*.

(*b*) *Ilderton v. Atkinson*, 7 T. R. 480.

(*c*) *Shuttleworth v. Stephens*, 1 Camp. 408. See *Banks v. Kain*, 2 C. & P. 597.

In an action against the owner of a ship for money lent, the captain is a competent witness to prove that it was advanced to him on account of the ship (d). Neutral witness.

A pauper in a settlement case is a competent witness; for he must be maintained at all events (e); and any local prejudice by which he may be influenced does not constitute a legal disqualifying interest.

In an action of trover for goods, a party who sold them to the plaintiff is a competent witness for him to prove the sale, although he sold them under an agreement that if not paid for they were to be returned; for he is either entitled to the goods or the price (f).

Where the opposite interests are unequal, the witness has an interest on one side, measured by the excess of the one interest over the other. And therefore where the interest is equiponderant in other respects, yet if the witness would be liable to costs in one event but not in the other, it seems that he is incompetent to give evidence tending to discharge him from such further liability. Thus the drawer of a bill of exchange which has been accepted for his accommodation, is not a competent witness for the acceptor in an action against the latter by an indorsee, for if the plaintiff succeeded he would be liable to the defendant for the costs (g).

For further illustrations of this principle, see *Ridley v. Taylor*, 13 East, 175. *Dickinson v. Prentice*, 4 Esp. C. 32. *Humphrey v. Moxon*, Peake's C. 52. *Rich v. Topping*, ib. 224. *Beard v. Ackerman*, 5 Esp. C. 119. *Pool v. Bousfield*, 4 Camp. C. 55. *Mainwaring v. Mytton*, 1 Starkie's C. 83. Vol. II. tit. BILL OF EXCHANGE—COMPETENCY.

In an action against the drawer of a bill, the acceptor was held to be incompetent to prove a set-off for the drawer on a bill accepted by the plaintiff and indorsed by the witness to the defendant, on the ground that the witness would be answerable to the drawer to the amount only recovered by the plaintiff. *Mainwaring v. Mytton*, 1 Starkie's C. 83. But it seems that the drawer would be entitled to recover the whole from the acceptor, the set-off operating as a payment to the plaintiff *pro tanto*. See Bayley on Bills, 540, 4th ed. Whether the plaintiff succeeded or the defendant, the witness would be liable to the amount of his own acceptance to the one or the other, and to no more. So although the witness had indorsed to the

plaintiff the defendant's acceptance; as a collateral security the result of the plaintiff's action would be immaterial to the witness; he would be liable to the amount of his acceptance, and be entitled as the holder of the plaintiff's acceptance, either to recover upon it, or set off the amount against the defendant.

(d) *Evans v. Williams*, 7 T. R. 481, n. *Rocher v. Busher*, 1 Starkie's C. 27.

(e) 2 T. R. 267.

(f) *Bankes v. Kain*, 2 C. & P. 597; and see *Radburn v. Morris*, 4 Bing. 649.

(g) *Jones v. Brookes*, 4 Taunt. 464. *Hardwicke v. Blanchard*, Gow. 113. *Bottomley v. Wilson*, 3 Starkie's C. 138. The competency of the witness in such a case is restored by his bankruptcy and certificate. *Bassett v. Dodgin*, 9 Bing. 653. *Ashton v. Longes*, 1 Mood. & M. C. 127. Vol. II. tit. BANKRUPTCY. See also the case of *Maundrell v. Kennett*, 1 Camp. 408. In the case of *Ilderton v. Atkinson*, 5 T. R. 480, it was held, that a witness to whom the defendant had paid 200l. on account of the plaintiff, was a competent witness for the defendant, to prove that he was the

Neutral
witness.

The preponderance must, however, in order to disqualify the witness, be certain and definite; for although it has been held that a witness was incompetent because it would in one event be more difficult for him to recover the same sum of money than in the other (*h*), yet the principle of this decision is very dubious, and probably would not now be supported (*i*).

omission,
ex ne-
cessitate.

In some instances the law admits the testimony of one interested, from the extreme necessity of the case; such a necessity arises from the particular nature of the subject of inquiry, which renders it exceedingly improbable that any person who is not interested should possess any knowledge of the facts, whether that improbability arise from the confined nature of the transaction, which makes it likely that no one is privy to it except the interested witness, or from the generality of the interest, which is equally likely to affect all other witnesses (*h*). But it is to be particularly ob-

agent of the plaintiff when he received the money, although it was objected, that if the plaintiff succeeded he would be liable to the defendant for the costs of the action. But in this case the Court seems to have relied principally on the ground that the witness was competent as an agent to prove a fact done in the course of his agency; for they observed, that if such an objection were to prevail, it would exclude brokers who had effected policies of insurance. The decision in the case of *Birt v. Kershaw*, 2 East, 458, seems to rest upon the same principle; and see Lord Ellenborough's observations in *Hudson v. Robinson*, 4 M. & S. 480; Vol. II. tit. ABATEMENT.

(*h*) *Buckland v. Tankard*, 5 T. R. 578.

(*i*) See the observations made in *Birt v. Kershaw*, 2 East, 458. The mere preponderance of difficulties is of too uncertain and contingent a nature to afford a practical rule in such cases.

(*k*) 3 Mod. 114; 6 Mod. 211; 1 Salk. 286; Holt, 300; 2 Lord Raym. 1179; 1 Sid. 211. 237. 431; 2 Keb. 384; 572. 1 Vent. 49. *R. v. Moise*, Str. 595. See tit. INHABITANT. In an action against a surety for the collector of rates, held that an inhabitant was a competent witness to prove payments to the collector *ex necessitate*. *Middleton v. Frost*, 4 C. & P. 16.

In the late case of *Lancum v. Lovell*, 9 Bing. 465, in an action for toll claimed for

passage on a public road, it was held that persons who had used the road, refusing to pay toll, were *ex necessitate* competent witnesses. This was decided on the ground that it is a public right in which all mankind are interested; and if such an objection were to prevail, a man would have only to set up a toll or any other claim as against all the world, and no man who had used the way could be called to controvert or contradict the claim, although he had uniformly resisted the yielding to such a demand.

It was held to fall within the second rule laid down, B. N. P. 289; that a party who has an interest will be admitted, when no other evidence can reasonably be obtained.

It was observed that it was unnecessary to consider whether the case of *Lord Falmouth v. George*, savoured more of a public or private right, because the present was clearly a case of public right; and that the case of *The Carpenters' Company v. Hayward*, Doug. 373, affected only a particular class of tradesmen, not the King's subjects in general.

In a case of collision, where the interest of witnesses (part of the crew of the ship in default) was doubtful, and the acts and words of the crew were brought forward to support the charge of misconduct, and there was no other evidence which could be produced, the Court, on the ground of necessity, and for the purposes of justice

served, that this necessity must result not from the accidental failure of evidence in a particular and isolated case, for it would be highly impolitic to sacrifice a general rule in order to alleviate a particular hardship, but it must be general in its nature, embracing a large and definite class of cases, and it must arise in the usual and natural course of human affairs (*l*). And it is to be remarked, that the law has justly been jealous of any extension of this rule, and that its operation has consequently been very limited in practice (*m*).

Admission,
—ex necessitate.

Upon this ground it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master (*n*), because it is in the usual course of affairs that a servant should transact such business for his master; and it often happens that no other person can prove such transactions, and therefore to exclude his testimony would frequently be to deprive the master of all evidence whatsoever (*o*).

Agent.

So it has been held that an apprentice is a competent witness to prove that money has been overpaid by his mistake (*p*). So it was held that a broker, although he was also a joint insurer, was a competent witness for the plaintiff, in an action on a policy of insurance, as to a representation made by him to the defendant when he subscribed the policy, because it was not likely that any other person could prove it (*q*). So in an action against a

admitted them as witnesses for the owners; and upon the evidence, the loss being found to have been occasioned by accident, imputable chiefly to an improper movement on the part of the injured vessel, and not to any misconduct of the other, the Court dismissed the latter with costs. *Catherine of Dover*, 2 Hagg. 145. See also the cases of *The Pitt* and *San Barnardina*, ib. n. 149. 151, where interested witnesses were admitted *ex necessitate rei*.

(*l*) See Mr. Evans's observations; Evans's Pothier, 208.

(*m*) See *Green v. The New River Company*, 4 T. R. 590; and Lord Kenyon's observations, in *Evans v. Williams*, 7 T. R. 481, in the note, where he says, that originally the plea of necessity was admitted in cases on the statute of Hue and Cry only.

(*n*) 4 T. R. 590. According to Buller,

J., such evidence is admissible "for the sake of trade, and the common usage of business;" B N. P. 289. According to Eyre, C. J., the exception is not confined to mere agents and brokers, but every man who makes a contract for another comes within the description; 2 H. B. 591. But Lord Tenterden seems to have considered that the principle did not apply where the only agency arose out of the particular transaction. *Edmonds v. Lowe*, 8 B. & C. 408. All agree in this, that the testimony of agents employed in the ordinary transactions of commerce is admissible *ex necessitate*. See the observations of Parke, J., 10 B. & C. 864.

(*o*) Except indeed through the medium of a release.

(*p*) *Martin v. Horrell*, Str. 647.

(*q*) Per Buller, J. *Bent v. Baker*, 3 T. R. 27. Vide JOINT INTEREST.

Agent. carrier for not delivering a parcel, his servant was held to be competent to prove the delivery (*a*).

Party injured.

So in an action by the party robbed, against the hundred, he is a competent witness as to the fact of robbery, although he is not only interested, but the plaintiff in the suit (*b*). So interest is no objection to competency, if all persons who are likely to know the fact are equally interested (*c*). And therefore the loser of more than 10*l.* at a sitting is a competent witness upon an information under the statute 5 Ann. c. 14, s. 5, which subjects the winner to the forfeiture of five times the money won, upon conviction, and authorizes *any person* to sue for it, and therefore any person is as much entitled to sue for it as the witness (*d*). So in the case of extortion by duress, and in other similar cases, which from their very nature admit of no proof but by the testimony of the party injured, he is, according to Lord Holt, a competent witness from necessity (*e*); but in such case, where the proceeding is of a criminal nature, the application of this rule is unnecessary, since the party defrauded is not disqualified as a witness (*f*).

Effect of the objection with respect to secondary evidence.

II. Where the witness from interest becomes incapable of giving his testimony, the effect with respect to evidence seems to be the same as if he were naturally dead, since his lips are effectually closed. Accordingly, where a witness to a bond is interested at the time of the execution of the deed, and continues to be so at the time of the trial, the instrument cannot be proved by evidence of his hand-writing, since his attestation, when he was interested, was a mere nullity and of no more effect than if he had not existed (*g*).

In such case, as in the event of the natural death of the witness, the deed may be established by proof of the hand-writing of the obligor (*h*). So in chancery, where a witness becomes

(*a*) *Ross v. Rowe*, 3 Ford's MSS. 98. Vide *supra*, tit. AGENT. The rule does not extend to cases where actions are brought against principals for the negligence of their agents; vide *supra*, 115; *infra*, 148.

(*b*) See Vol. II. tit. HUNDRED.

(*c*) *Lock v. Hayton*, Fort. 246.

(*d*) *R. v. Luckup*, 1 Ford's MSS. 542. Willes, 425 (*c*).

(*e*) 7 Mod. 119, 120.

(*f*) Vide *infra*, ACCOMPLICE—CRIMINAL PROCEEDINGS.

(*g*) *Swire v. Bell*, 3 T. R. 371. 1 Burr. 414. 423. *Doe v. Kersey*, 4 Burn's E. L. 97. *Anstey v. Dowsing*, 2 Str. 1253. *Infra*, 139 (*l*). Vol. II. tit. WILL.

(*h*) *Godfrey v. Norris*, Str. 34. *Goss v. Tracy*, 1 P. W. 280. So where he becomes infamous. *Jones v. Mason*, 2 Str. 833. *Infra*, tit. INSTRUMENT, PROOF OF.

interested, his deposition made while he was disinterested, may still be read (*i*).

But it has been held, that where a disinterested witness makes a deposition and afterwards becomes interested, his deposition cannot be read upon a trial at common law (*k*).

III. The objection to competency ought properly to be taken in the first instance, previous to an examination in chief, for otherwise the party objecting might suspend the objection for the purpose of obtaining an unfair advantage (*l*). Unless the interest of the witness be apparent from the record itself or from the admission of the adversary, it lies with the party who makes the objection to support it (*m*) either by the examination of the witness on the *voire dire* or by independent evidence (*n*).

Examination on *voire dire*.

Notwithstanding the *primâ facie* appearance of interest on the part of the witness on the face of the record, yet it seems that

(*i*) 2 Vern. 699; 1 P. W. 187; Ab. Eq. 224; 2 Atk. 605; 2 Ves. 42; 2 Ld. Raym. 1008; 1 Salk. 286.

(*k*) 2 Vern. 699; Ab. Eq. 324; vide *infra*, tit. DEPOSITION.

(*l*) *R. v. Muscot*, 10 Mod. 192.

(*m*) It is not sufficient to suggest, or even to show a probability, or excite a suspicion, that the witness stands under circumstances which tempt him to represent the fact one way rather than the other; it is incumbent on the party objecting to show it with certainty.

Declaration in replevin for taking the growing corn of the plaintiff. Avowry, that plaintiff and one *J. B.* held the *locus in quo*, as tenants to the defendant, at a money-rent, and because it was in arrear defendant took the corn as a distress. Plea in bar, denying the tenancy *modo et forma*, and issue joined thereon. At the trial some evidence was given by the defendant that the plaintiff and *J. B.* were in possession of the premises in question; that a lease had been executed to them by the defendant's ancestor, which plaintiff and *J. B.* had paid for, but which they had refused to execute. It was not proved that *J. B.* was so connected with the plaintiff, as to the premises in question, as to be jointly liable for the rent, nor was it shown that the corn was the joint property of the plaintiff and *J. B.* The plain-

tiff gave evidence to show that the holding was under an agreement for a corn-rent, and in support of that case he tendered *J. B.* as witness. He was rejected without being examined on the *voire dire* as to his liability to the rent or not. Held that he was not an incompetent witness until that fact was established, and therefore that he was improperly rejected. *Bunter v. Warre*, 1 B. & C. 689. It will be presumed that the action is brought by the authority of the party beneficially interested. *Bell v. Smith*, 5 B. & C. 188.

(*n*) Formerly it was necessary to have the witness sworn on the *voire dire*, and to take the objection before he was sworn in chief, but the rule has been relaxed for the sake of convenience; see 1 T. R. 717. The witness may be examined on the *voire dire* in criminal as well as civil cases. *R. v. Muscot*, 10 Mod. 192. See *Ld. Lovat's Case*. In *R. v. Wakefield and others*, Lancaster Spring Assizes, 1827, on an indictment for a conspiracy to carry away Miss Turner and marry her to one of the defendants, on an objection taken by the defendants to the competency of Miss T. on the ground that she was married to one of the defendants, Hullock, B. held, that the proper course was first to examine Miss T. on the *voire dire*, and afterwards to adduce collateral evidence.

Proof of,
by evi-
dence.

his evidence ought not to be rejected without examining him on the *voire dire* as to his real situation (*o*). The witness may be examined generally as to his situation, and even as to the contents of written documents which are not produced (*p*); for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection; and in like manner his competency may be restored by his parol evidence on the *voire dire* (*q*). If the witness discharge himself on the *voire dire*, the party who objects may still afterwards support his objection by evidence (*r*); but in so doing the objecting party is bound by the usual rules of evidence, and cannot inquire as to the contents of a written instrument without producing it, or proving the usual preparatory steps (*s*). Neither in such case, as it seems, can the objection be removed by the examination

(*o*) *Bunter v. Warre*, 1 B. & C. 689. *Supra*, 135, note (*m*). But see the case of *Goodhay v. Hendry*, 1 Moody & M. 319; where Best, C. J. held, that in an action by the assignee of a bankrupt, the competency of the bankrupt could not be restored by his examination on the *voire dire*, and without producing the release and certificate. And see 1 Moody & M. 321, where Tindal, Ld. C. J. observed, that the difficulty was, the objection did not arise on the *voire dire*, but appeared from the pleadings themselves. But in the case of *Wandless v. Cuthorne*, Guildh. Dec. 3, 1829. 1 Moody & M. C. 321, Parke, J. said that he should overrule the objection, which had been taken in a similar case. The same point was also ruled by Parke, J. *Carlile v. Eady*, 1 C. & P. 234.

(*p*) *R. v. Gisburn*, 15 East, 57. *Howell v. Locke*, 2 Camp. 14. But where the witness, on examination on the *voire dire* produced the contract which, as was contended, rendered him incompetent, it was held that the contract ought to be read. *Butler v. Carver*, 2 Starkie's C. 493, cor. Abbott, C. J.

(*q*) *R. v. Gisburn*, 15 East, 57. And therefore, where a witness on an appeal against a removal order, stated on examination on the *voire dire*, that he occupied a house in the appellant's township, but paid no rates, it was held that he was compe-

tent. And see *Botham v. Swingler*, 1 Esp. C. 164; *Butchers' Company v. Jones*, ib. 160. *Ingram v. Dade*, London Sitt. after Mich. 1817. It is not sufficient that a second witness should state that the first witness has been released, without producing the release. *Corking v. Jarrard*, 1 Camp. 37. And it is not sufficient that the witness, liable under an instrument not produced, should state *his belief* that he had been released by an instrument not produced. *Woolley v. Brownhill*, 1 Maclell. & Y. 324.

(*r*) In the case of *The Queen v. Muscot*, 10 Mod. 192, Parker, C. J. is reported to have stated, that a party has his election to prove the interest of the witness, either by examination on the *voire dire*, or by evidence, but that he could not do both. And see Lord Lovat's Case, 9 St. Tr. 647. But it would manifestly be unjust to preclude the party from impeaching the competency of a witness by satisfactory evidence merely because he had taken the objection in the first instance in the proper mode, and the witness had been hardy enough to misrepresent his situation. And see *R. v. Wakefield and Others*, *supra*, 135, note (*n*).

(*s*) *Howell v. Locke*, 2 Camp. 14, where the witness for the plaintiff was asked on cross-examination what interest he took under a will which was not produced, and the question was overruled.

of the witness. Where it is discovered incidentally in the course of the cause that the witness is interested, his evidence will be struck out, although no objection has been made to him on the *voire dire* (t). Yet it seems that a party who is cognizant of the interest of the witness at the time when he is called, is bound to make his objection in the first instance, according to the general principle (u), for otherwise he might obtain an unfair advantage, by having it in his power to establish or to destroy the evidence, just as was most beneficial to himself. This seems to be a matter entirely within the discretion of the Court. Where the witness, having been examined, had left the box, but on being recalled answered a question put by the Court, from which it appeared that he was interested, it was held that his competency could not then be disputed (x). And where a witness had been examined and cross-examined or interrogated without objection, it was held that the objection to competency could not be taken at the trial (y). The Courts will not, it seems, grant a new trial on the mere ground that it has been discovered, subsequently to the trial, that some of the witnesses were interested (z). And it has been held that where a witness had been improperly received, yet if the Court see clearly that there was sufficient evidence to warrant the verdict without his testimony, a new trial will not be granted (a). So, also, that the improper rejection of the witness as incompetent, is no ground for granting a new trial, where it appears that such rejection could have made no difference in the result; as where another witness was called by the plaintiff, who established the same fact, and the defence and verdict for the defendant turned wholly on a collateral point.

Time of
objecting.

(t) Per Lord Ellenborough, *Howell v. Lock*, 2 Camp. 14; *Periyal v. Nicholson*, 1 Wightw. 64.

(u) The ancient doctrine on this head was so strict, that if a witness were once examined in chief, or even sworn in chief, he could not afterwards be objected to on the ground of interest. The rule has been relaxed for the sake of convenience. In the case of *Turner v. Pearte*, 1 T. R. 717, where a new trial was moved for on the ground that it had been discovered since the trial that the witnesses were incompetent, the motion was refused, and it was said by Buller, J. that there was no instance in which a party had been allowed, after the trial, to avail himself of an objection which was not made at the time of

examination; and Grose, J. laid great stress upon the circumstance, that it did not clearly appear that the party was ignorant of the objection at the time of trial. Such a circumstance might however, as it seems, operate as an inducement to grant such a motion, where it clearly appeared that the party was ignorant of the objection at the time of trial, and where he had merits. *Ibid*.

(x) *Beeching v. Gower*, Holt's C. 313.

(y) *Ogle v. Paleshi*, Holt's C. 485.

(z) *Turner v. Pearte*, 1 T. R. 717; see note (u).

(a) *Nathan v. Buckland*, 2 Moore, 156. And see *Horford v. Wilson*, 1 Taunt. 12; and *Edwards v. Evans*, 3 East, 451. But see tit. NEW TRIAL.

Time of
objecting.

Although it lies on the objecting party to prove incompetency, yet after incompetency has once been shown, its continuance will be presumed till the contrary be proved (*b*).

Removal of
interest.

The objection to competency on the ground of interest is removed by an extinguishment of that interest, by means of a release, executed either by the witness himself, or by those who would have a claim upon him, or by payment (*c*). Where, however, from the special nature of the case the interest cannot be released, the witness will not be competent *quasi ex necessitate*; and therefore no release will enable a bankrupt to prove his bankruptcy (*d*).

Release.

A general release of all causes of action to that time will discharge the witness from liability dependent on the existing suit, for the foundation of that liability being laid at the time, the release will embrace that liability. In an action against the acceptor of a bill for the drawer's accommodation, the latter having become bankrupt, was held to be a competent witness for the defendant, on a release to him, without releasing the assignees; for the release comprehending all future claims in respect of any cause of action then existing, would bar the claim of the defendant as surety, and exclude proof of the debt under the commission (*e*).

Where the claim from which the witness is to be discharged has not yet arisen, a general release from all claims up to the date of the release will not be sufficient (*f*).

(*b*) As where the proposed witness stated on the *voire dire* that he was bail to the sheriff, and had not justified, or done anything to relieve him from liability. *Hawkins v. Inwood*, 4 C. & P. 148. See also the cases where a witness is incompetent by reason of *prima facie* liability to pay for goods in an action for the price. *Piesly v. Von Esch*, 2 Esp. C. 605.

(*c*) As to the form and effect of a release, see Vol. II. tit. RELEASE.

(*d*) *Field v. Curtis*, Str. 829. In an action on the 9 Ann. c. 14, brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss. Held, that he was incompetent, but that his competency was restored by three releases;

first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee (who was not a creditor) to the bankrupt; held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release, signed by all those who had proved, might therefore be considered as a release by all the creditors: thirdly, that such a release did not destroy the assignee's right of action. *Carter v. Abbott*, 1 B. & C. 444.

(*e*) *Cartwright v. Williams*, 2 Starkie's C. 342. And see *Scott v. Lifford*, 1 Camp. C. 249.

(*f*) Where the witness was entitled to a distributive share of the intestate's effects, of which the sum to be recovered in the action by the plaintiff, as a surviving partner (being also administrator), would form part: held, that a general release at

It has been held, that in an action against one of several partners in trade, the defendant could not by a release make a co-partner competent to defeat the action (*g*). In the case of an existing co-partnership, the interest of the witness seems to be immediate and direct, for the consequence of a verdict and judgment for the plaintiff would not merely be to subject the witness to an action for contribution, as in the case of a mere isolated joint contract, but to diminish the partnership property (*h*), which might be taken in execution. The case is, it seems, distinguishable from that of a mere joint contract entered into by persons not partners, and also from cases where the co-partnership has ceased to exist, and consequently where the partner sued must seek his legal remedy by action, for there all interest would be discharged by a release. In an action against a part-owner for work done to a vessel, another part-owner, being released by the defendant, is a competent witness (*i*).

Where in an action against two partners to recover the balance of a banking account of many years, a witness called for the defendants, admitted that he had been a co-partner with them during a part of that time; it was held that he was rendered competent by general releases from the witness to the defendants, and from the defendants to the witness; for it was considered that the future right released had a foundation and inception at the time of the release (*k*).

A legatee who releases a legacy, becomes, it seems, a good witness to prove the will (*l*).

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where

the trial of all claims, &c. up to the date of the release, would not render the party a competent witness, such share arising, if at all, after the release. *Matthews v. Smith*, 2 Y. & J. 426.

(*g*) Per Lord Tenterden, in *Simons v. Smith*, Ry. & M. C. 120.

(*h*) Lord Alvanley, in the case of *Cheyne v. Koope*, 4 Esp. C. 162, also ruled that a co-partner with the defendant could not be made competent by means of a release, because if the defendant died, or became insolvent, the plaintiff would have a right in equity to compel the partners to contribute.

(*i*) *Jones v. Pritchard*, 2 M. & W. 199.

(*k*) *Wilson v. Hirst*, 4 B. & Ad. 460. See *Lampet's Case*, 10 Rep. 506.

(*l*) Said to have been solemnly agreed by the Judges; Vin. Ab. *Evidence*, 14, n. 53. See *Wyndham v. Chetwynd*, 1 Burr. 414; and *Doe v. Kersey*, 4 Burn. Ecc. L. 97, (by three of the Judges), to show that a subscribing witness is restored to competency if all interest be extinguished at the time of his examination. Lee, L. C. J., in *Anstey v. Dowding*, 2 Str. 1253; and Lord Camden, C. J., in *Doe v. Kersey*, was of a contrary opinion. See Vol. II. tit. WILL.

Release.

the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claims on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus (*n*).

On an ejectment brought by a corporation to recover land, it was held that a mere release by a corporator is insufficient to restore his competency, although he released his interest in the premises for which the action was brought (*n*). Where the witness is liable, not to the party in the suit, but to an intermediate person, a release by the latter is sufficient (*o*).

A guardian cannot release a claim by his ward (*p*).

Where an interested witness has made a deposition, and being afterwards released, is again examined, his evidence is admissible, although the second deposition be the same with the first (*q*).

A party cannot, by refusing his assent to a release or surrender, tendered by a witness on the other side, exclude his testimony (*r*).

The witness and the defendant having, with other underwriters, filed a bill in equity against the plaintiff for relief, the plaintiff on this ground objected to the witness as being interested; the witness and the defendant offered to pay the costs of the bill, and to procure it to be dismissed, and the witness was held to be competent, although the plaintiff still objected that there were other plaintiffs in equity (*s*).

Surrender.

So where the lessor, in an ejectment, refused to accept a surrender of an estate devised to the witness, who was called by the defendant, who claimed as devisee, to prove the testator's sanity (*t*).

So a witness cannot, by perversely refusing to accept a release, deprive a litigant party of the benefit of his testimony (*u*).

(*m*) *Perryman v. Steggall*, 8 Bing. 360. Vide *supra*, 138, note (*d*).

(*n*) *Doe v. Tooth*, 3 Y. & J. 10. As to the mode of rendering a corporator competent, see Vol. II. tit. CORPORATION.

(*o*) In trover for a barge by a purchaser from one *B.*, the defendants claiming it under *W.*, who was alleged also to have purchased it from *B.*; held, that *B.* having been released by *W.*, was a competent witness for the defendant, who could never have sued him, and *semble* no release was

necessary. *Radburn v. Morris*, 4 Bing. 649.

(*p*) *Fraser v. Marsh*, 2 Starkie's C. 41.

(*q*) *Callow v. Mire*, 2 Vern. 472. The bias on his mind to adhere to his former testimony goes to his credit.

(*r*) Per Lord Kenyon, C. J., and Buller, J., 3 T. R. 27.

(*s*) *Bent v. Baker*, 3 T. R. 27.

(*t*) *Goodtitle v. Welford*, Doug. 134.

(*u*) Doug. 134. In *Anstey v. Dowsing*, 2 Str. 1253, Lee, J. was of opinion that a legatee was not competent to prove a will, although the amount had been tendered to

A legatee whose legacy has been paid, or any other person whose interest is founded upon a claim which has been satisfied, is a competent witness (*x*). Payment.

So although in prosecutions for forgery it was formerly a general rule that the party whose name was forged, and who would have been liable upon the instrument, supposing it to be genuine, was not a competent witness, yet where a bill of exchange was forged, purporting to be drawn by *A.* on *B.*, payable at *C.*'s banking-house, which *C.* had paid, supposing the acceptance to be genuine, but afterwards had given credit to *B.* for the amount, it was held that *B.* was a competent witness (*y*).

So where the party whose receipt had been forged had previously recovered the money from the prisoner (*z*).

So where the party whose name had been forged to a receipt, for the amount of articles supplied by him, had been paid the amount of his bill (*a*).

So in the case of the forgery of a bill of exchange, purporting to have been drawn by the witness, if he were released by the holder, and there were no other party whose name was on the note to whom the drawer was liable, he became competent (*b*).

So if the supposed obligor of a bond was released by the supposed obligee, the former was competent (*c*).

In order to render a witness competent by a release, it is not sufficient that another witness should swear that a release has been executed (*e*). And such an instrument, when produced and proved, is, it seems, evidence as a document in the cause for all purposes (*f*). Proof of release (*d*).

the witness, and refused. But this was on the ground that had the witness accepted the legacy, he would still have been incompetent, as having been interested at the time of attestation. But as to this point see Vol. II. tit. WILL.

(*x*) See *Kingston v. Gray*, Lord Raym. 745; where, upon issue taken on the plea of *plene administravit*, it was held that a bond-creditor who had been paid was competent to prove the debt and payment, although, if the bond was not authentic, or the debt not due, he would be liable to refund. But (*semble*) the liability to refund was no objection to his testimony, since in an action to recover the money, the verdict in that cause would not have been evi-

dence, and his legal situation would not have been altered. See below, tit. INTEREST—LEGATEE.

(*y*) *R. v. Usher*, Leach, C. C. L. 57, 3d edit.; East's P. C. 999. *R. v. Testick*, East's P. C. 1000; 12 Mod. 338.

(*z*) *R. v. Wells*, B. N. P. 289. *R. v. Dean*, 12 Vin. Ab. 23.

(*a*) *R. v. Smith*, East's P. C. 1000.

(*b*) *R. v. Akhurst*, Leach, 178.

(*c*) *R. v. Dodd*, Leach, C. C. L. 87. East's P. C. 1003.

(*d*) As to the stamp, see Vol. II. tit. STAMP.

(*e*) *Corking v. Jarrard*, 1 Camp. 17.

(*f*) *Gibbons v. Wilcox*, 2 Starkie's C. 43, per Holroyd, J.

A release by one of several plaintiffs (*g*) or defendants (*h*) is sufficient.

Release,
effect of.

Where several parties entered into a joint undertaking, and an action was brought against one; held that a joint contractor, being released by him, was a competent witness, although the rest did not join in it, as the defendant could only recover against him his rateable share, and each would be liable for no more (*i*).

Where an interested party is released by the plaintiff to make him a competent witness, the defendant cannot take advantage of the release by a plea *puis darrein continuance* (*j*).

The failure to execute a release according to an undertaking is not a ground for a new trial (*k*).

Bail.

Where the witness was objected to as being one of the defendant's bail, the Court, upon depositing the sum sworn to, and a further sum for costs, made an order for striking out the witness's name from the bail-piece (*l*).

If a witness be called for the plaintiff, who is liable to the defendant on a bond for the costs of an action, he will be allowed to give evidence on depositing the amount of the penalty of the bond with the officer of the Court (*m*).

Indemnity.

It is not sufficient that a witness, liable in event of a verdict against his party, should have been merely indemnified by a third party.

A sheriff's officer who made the levy is not a competent witness to prove the fairness of the sale of goods taken in execution, although indemnified by the execution creditor, for it is his interest to defeat the action, as he might never get repaid on his indemnity (*n*).

Some cases will now be cited to show how parties standing in particular relations stand affected in point of competency by

(*g*) *Hockless v. Mitchell*, 4 Esp. C. 86.

(*h*) *Whitmore v. Waterhouse*, 4 C. & P. 383. Where one of several coach-owners being sued for negligence, released the coachman. A release of a bond-debt by one of several obligees operates as the release of all. *Bayley v. Lloyd*, 7 Mod. 250. A release to one of several obligors discharges all, whether the bond be joint or joint and several. 1 B. & P. 630; Co. Litt. 232.

(*i*) *Duke v. Pownal*, 1 Mood. & M. 430. And see above, 138, note (*d*).

(*j*) In an action against the sheriff for removing goods under an execution, with-

out first satisfying a year's rent, it was held that the tenant being released, was a competent witness for the landlord, and that the defendant could not avail himself of such release by plea *puis darrein continuance*, nor limit the verdict to nominal damages only. *Thurgood v. Richardson*, 4 C. & P. 481.

(*k*) *Heming v. English*, 5 Tyr. 185; 1 C. M. & R. 568.

(*l*) *Baily v. Hole*, 3 C. & P. 560. *Pearcy v. Heming*, 5 C. & P. 503.

(*m*) *Lees v. Smith*, 1 Mood. & R. C. 329.

(*n*) *Whitehouse v. Atkinson*, 3 Carr. & P. C. 345.

the application of the above principles and rules. Some remarks will also be made as to the operation of the late stat. 2 & 3 Will. 4, c. 42: but as the effect and meaning of this statute are by no means yet determined, it would be presumptuous to do more than offer a few suggestions on the subject, which may appear to be warranted by such decisions as have already been pronounced.

The general competency of an accomplice will be afterwards considered (*o*). Some observations will now be made as to the situation of accomplices and joint wrong-doers in general, as to their competency in respect of *interest*. In criminal proceedings, the motive which usually operates upon the mind of an accomplice as a witness for the Crown, is the expectation of personal security (*p*). This (*q*) does not disqualify the witness; it was formerly held, that even an express promise of pardon would not render him incompetent (*r*). According to the present practice, an accomplice has nothing more than an equitable title to pardon in case he gives his testimony fairly and openly. And although in certain cases an accomplice who discovers other offenders is by the statute law entitled to a pardon (*s*), he is still considered to be a competent witness upon a consideration of the intention and construction of those statutes.

Accomplice—Expectation of pardon.

The same principle applies to the case of bribery under the stat. 2 Geo. 2, c. 24; for although the statute enacts, that the discoverer of any other offender shall be indemnified from all the penalties of the Act, it was held that a witness in an action under the statute was competent, although he claimed to be the first discoverer of the defendant's bribery, and although he meant to avail himself of such discovery in an action already brought against himself (*t*); for upon a consideration of the statute the Court held that the Legislature intended to render the discoverer a competent witness, although he would have been incompetent at common law, his own indemnity being the natural and immediate effect of a conviction.

Where an accomplice is to be used as a witness, the usual course, as will be seen, is to leave him out of the indictment (*u*), or for the attorney-general to enter a *nolle prosequi* (*x*). But yet, although

Competency of a co-defendant.

(*o*) Vol. II. tit. ACCOMPLICE.

(*p*) As to the expectation of a reward, vide *infra*, 154.

(*q*) Vol. II. tit. ACCOMPLICE.

(*r*) Ibid.

(*s*) Ibid.

(*t*) *Heward v. Shipley*, 4 East, 180. And Vol. II. tit. BRIBERY.

(*u*) Vol. II. tit. ACCOMPLICE. Where an accomplice has been inadvertently included in the indictment, if it should be deemed necessary, an acquittal might be taken as to him.

(*x*) *Ward v. Man*, 2 Atk. 229, by Lord Hardwicke, who said, that in Crown prosecutions no defendant can be examined on

Competency of a co-defendant.

he be jointly indicted for an offence which is several in its nature, it may be doubted whether he be not still competent, provided he be not put upon his trial at the same time; for though several be indicted jointly for the same offence, yet the indictment, where the nature of the offence is several, is also several as to each, and the case seems to be just the same as if each had been severally indicted, when they would have been witnesses for each other (y); they must therefore, as it seems, be also equally competent as witnesses against each other (z.)

behalf even of the King; but the attorney-general enters a *nolle prosequi* against that particular defendant before he can be admitted as a witness; and that this was done in a case by Trevor, when attorney-general. See also the case of *The King v. Ellis, Blake and others*, Sitt. after Trin. 1802, Macnally, 55; where on an information by the attorney-general (Law) against several for a conspiracy, he entered a *nolle prosequi* against two, who were examined as witnesses against the others.

(y) 2 Hale, 280; 2 Rol. Ab. 685, pl. 3.

(z) See Vol. II. tit. ACCOMPLICE. But see B. N. P. 285, where it is said, that the Court would not allow the attorney-general, on the trial of an information for a misdemeanor, to examine a defendant for the King, without entering a *nolle prosequi* as to him. But *qu.* whether in that case the witness had not been put upon his trial at the same time. See *Ward v. Man*, 2 Atk. 220; Macnally, 53. In the case of *R. v. Lafone*, 5 Esp. C. 154, on an indictment for obstructing excise officers, Lord Ellenborough would not permit co-defendants who had suffered judgment by default, to be examined as witnesses for the defendant who was tried; saying, that he had never known such evidence admitted on an indictment for a joint offence. The cases on the subject were not, it seems, adverted to on that occasion. In *R. v. Fletcher*, Str. 633, one who had suffered judgment by default on a joint indictment for an assault, and had been fined, and had paid a shilling, was admitted as a witness for the other defendant. There indeed the witness had been fined; but it is difficult to say how the circumstance, that the

judgment has been pronounced and executed on the witness, can make any difference as to his competency, or how his giving evidence can at all alter or affect his legal situation. It has been held, that upon several indictments against three for perjury in proving a bond, each was a witness for the others. *R. v. Bilmore, Gray and Harbin*, 2 Hale, 280. And see also *Gunston v. Downs*, ib. & 2 Rol. Abr. 685, pl. 3. According to the same principle, if each had been separately indicted for a battery or larceny, the others would have been competent witnesses; for the same reason applies which is given by Lord Hale, viz. that they are not immediately concerned in the trial against the third, and therefore they would, it should seem, be also competent, although they were all to be included in one indictment, which in legal effect operates as a several indictment as to each. See *R. v. Frederick and Tracy*, Str. 1095, where, upon an indictment against several for an assault, the reason for refusing to admit the wife of one as a witness for another defendant, was, that it was impossible to separate the case of the two defendants. *R. v. Sherman*, C. T. H. 303. It has indeed been suggested, that if one who suffered judgment by default were a competent witness, one defendant by so doing, might protect the rest, (5 Esp. C. 155); assuming it to be probable that one of several delinquents would sacrifice himself for the salvation of the rest, it would by no means be a necessary consequence that he would be able to screen them; his credit would be open to the observation of the jury, and be subject to much suspicion. It is also to be observed, that the prosecutor may in general avail himself, if he chooses, of the testi-

An accomplice is also a competent witness for his associates where he is not indicted at all, or where he is separately indicted (*a*); perhaps also where he is jointly indicted, as where he has let judgment go by default (*b*). Where, however, the offence is of such a nature that an acquittal of his associates would enure to his own acquittal, he is incompetent. Thus an accessory before or after the fact would be incompetent as a witness for the principal, and a co-conspirator would be incompetent to discharge his associates (*c*).

Accomplice.

In civil cases it seems that an accomplice, or joint wrong-doer, who is not a party to the record, is a competent witness on either side, unless he be in some way answerable over to the defendant for the consequence of his conduct, as an agent is, where the action is brought against the principal in respect of the negligence of the agent (*d*).

It seems to be now held that a joint trespasser is a competent witness for the plaintiff, although a recovery against the defendant would discharge the action against himself (*e*). This, however, is at all events a fact which tends to lessen his credit (*f*). This rule, which seems to be commonly acted on in the case of a joint trespasser, seems also to extend generally to all cases where a joint *tortfeasor* is called as a witness by the plaintiff (*g*).

Co-trespasser.

A co-trespasser, or other joint wrong-doer, who is not a party to the record (*h*), is in general a competent witness for the defendant; for the record would not be evidence for him in another action, and

many of a *particeps criminis*, even where the latter has a bias on his mind in favour of conviction; and therefore there seems to be no sufficient reason why a defendant should not avail himself of similar testimony.

(*a*) Vol. II. tit. ACCOMPLICE.

(*b*) *Supra*, 144, note (*z*). So if there be no evidence against one. See the case of the ship *Bounty*, 1 East, 313, n.

(*c*) Vol. II. tit. CONSPIRACY.

(*d*) *Infra*, 148.

(*e*) B. N. P. 286. In the case of *Barnard v. Dawson*, Guildhall, Sitt. after Mich. Term, 1796, Lord Kenyon rejected the testimony of a co-trespasser when called as a witness for the plaintiff. But in the case of *Chapman v. Greaves and others*, 2 Camp. 333. n. Le Blanc, J. admitted a co-trespasser as a witness for the plaintiff. But it has been said that the learned Judge (Le Blanc) who admitted

this evidence, afterwards doubted as to the propriety of the decision. See *Lethbridge v. Phillips*, 2 Starkie's C. 544. In the case of *Chapman v. Graves*, above cited, Le Blanc, J., held that a joint-trespasser who had let judgment go by default, was not a competent witness for the plaintiff. And see *Brown v. Brown*, 4 Taunt. 752. In the case of *Hall v. Curzon and others*, 9 B. & C. 646, Lord Tenterden said, "In practice the co-trespasser is constantly called to prove that he did the act by the command of the defendant."

(*f*) B. N. P. 286.

(*g*) See *Lethbridge v. Phillips*, 2 Starkie's C. 544.

(*h*) As to the competency of parties which rests upon other considerations, as well as that of an interest in the event, see tit. PARTIES.

Co-tres-
passer.

his interest is rather on the other side ; since, if the plaintiff failed in obtaining compensation against the present defendant, he might afterwards attempt to recover it from the witness, and if the plaintiff recovered, the witness would not be liable to the defendant for contribution (*h*). The defendant, in an action of trespass, pleaded that R. Mawson, who was named in the *simul cum*, had paid the plaintiff a guinea in satisfaction. It was held by Eyre, C. J., that Mawson was a competent witness for the defendant ; for what he had to prove could not be given in evidence in another action, and he admitted himself to be a trespasser (*i*).

It has been said, that if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, by producing the process, and prove also an ineffectual endeavour to arrest them, or that the process was lost, the defendant shall not have the benefit of their testimony (*j*). The grounds of this decision are not very obvious ; a co-defendant under such circumstances is neither immediately interested in the event of the suit, nor in the record, for the purposes of evidence (*h*), and he is no party to the trial of the issue. In Gilbert's Law of Evidence (*l*), this case is propounded : Trespass against *A.* and *B.* for two horses, evidence against *A.* as to one ; and the question is, if he may be a witness for *B.*, in relation to the other ; and the learned writer observes thus : It seems that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself ; but if it were not a single fact, but two distinct trespasses at different times and places, but arbitrarily joined in the same declaration, then they may be witnesses, one for the other, because the oath of one of

(*h*) Trespass and plea of *liberum tenementum* in a third person, that person is a competent witness to prove that after having conveyed the land to the plaintiff he subsequently conveyed it without warranty to the defendant, and took a mortgage from him, for he had no legal interest in the event ; and his coming to impeach a former conveyance to the plaintiff affects not his competency, but only his credit. *Simpson v. Pickering*, 5 Tyr. 143.

Trover by *A.* for goods fraudulently obtained from him by *B.*, the latter is a competent witness. *Triebner v. Soddy*, 7 C. & P. 718.

The servant of a party who had been bargaining for the purchase of a chattel, came to the owner, and said that his mas-

ter desired to look at it, and would keep it if approved of : the chattel was in consequence delivered to the servant ; held that the master was a competent witness to prove in defence that the message had been delivered by his authority, and the chattel received and kept by him. *Grylls v. Davies*, 2 B. & Ad. 514.

(*i*) *Poplet v. James*, Trin. 5 Geo. 2 ; B. N. P. 286.

(*j*) *Reason v. Ewbank*, Hil. 1 Geo. 1, *per omnes Just.* ; B. N. P. 286. *Lloyd v. Williams*, Rep. T. II. 123. *Hill v. Fleming*, ibid. 264.

(*k*) His interest is rather the other way.

(*l*) 135, 2d ed.

them has no influence on the crime laid to his charge, but merely goes in discharge of the other. A *quære* is however added to this case, which certainly goes to a great extent. According to modern practice, however, there would be little difficulty in the solution. If the plaintiff could not affect *A.* and *B.* jointly with respect to either of the horses, he would be put to his election against which of them he would proceed, for he could not recover jointly against both for the separate trespass of either. Having made his election to proceed against one, the other would be entitled to his acquittal, and would then be a competent witness for the former.

Co-tres-
passer.

Where, however, a co-trespasser is made a defendant, he is not in general competent as a witness on either side (*m*); but if he has been made a co-defendant by mistake, the Court will, on motion, give leave to strike his name out of the record, even after issue joined (*n*); for it seems to be a general rule that a plaintiff can in no case examine a defendant, although nothing be proved against him (*o*). But if there be no evidence to charge one co-defendant, he may, after the plaintiff's case has been closed, be acquitted (*p*), and examined as a witness for the rest (*q*); for otherwise the plaintiff might exclude all the defendant's witnesses, by making them co-defendants.

Where a co-trespasser lets judgment go by default, he is a competent witness for a co-defendant (*r*), but he is not a competent

(*m*) Per Le Blanc, J. 2 Camp. 333 (*u*.)

(*n*) B. N. P. 285; 1 Sid. 441.

(*o*) B. N. P. 285.

(*p*) In *Huxly v. Berg*, 1 Starkie's C. 98, Lord Ellenborough held, that no evidence having been given to affect Jones, one of the several defendants in trespass, the latter ought not to be acquitted until the *whole case* was ready for the jury; but that, after evidence brought by the other defendants, the plaintiff could not, in adducing evidence in reply, give fresh evidence to implicate Jones.—Where three of five joint-contractors had pleaded that after the promises and cause of action they became bankrupts, and the plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issue joined on the proof under the commission; a question arising whether the other two defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause, that they

may be called as witnesses for the other defendants. *Emmett v. Butler*, 7 Taunt. 599; and see 1 Moore, 332. *Currie v. Child*, 3 Camp. 283. *Wynne v. Anderson*, 3 C. & P. 596. *Wright v. Paulin*, Ry. & M. C. 128. Especially if the other defendants call witnesses; *ib.* But in the case of *Kentall v. Kilshaw*, Lancaster Spring Ass. 1834, Alderson, J. held that a co-defendant, against whom there was no evidence, ought to be acquitted at the end of the plaintiff's case. He said that this had been so held by all the Judges on consultation; and that were it otherwise, the party against whom no evidence was offered would be entitled to cross-examine all the witnesses for the defendant. The same was held by Parke, J., in *Child v. Chamberlain*, 6 C. & P. 416; and see *Bate v. Russell*, 1 Mood. & M. C. 382.

(*q*) Gilb. L. Ev. 134, 2d ed.; 1 Hale, 307; 1 East, 313.

(*r*) *Ward v. Haydon and Ventom*, 2 Esp. C. 552. And the same point was

witness for the plaintiff(s). So a co-defendant in ejectment, who lets judgment go by default, is a competent witness for another defendant (t).

Agent.

Agents.—Where a *servant* acts for his master in the common course of business, he is, as has already been seen, competent from the necessity of the case (u); such testimony has been deemed to be admissible upon a penal action against the master for selling coals without a bushel (x). Where money has been paid by the servant for his master (y); where the son has received money for his father, and paid it over to the defendant (z); where an apprentice has paid his master's money by mistake (a); where a porter has delivered goods for his employer (b); where a carrier has been employed to convey goods, although he was responsible to the consignor (c). In an action against a captain for deserting the vessel, a mariner who was on board was held to be a competent witness to prove that there was a necessity for leaving the ship, although he had given a bond to the captain not to desert (d).

Factor.

In proof of the sale of goods, the *factor* is competent (e) to prove the contract, even where he is to receive a *per-centage* for his own commission (f), or although he is to receive the excess of the price beyond a specified sum, for his own use (g), or has a

ruled by Wood, B., Lancaster Spring Ass. 1809, cited 2 Camp. 334, in note. And see *Chapman v. Greaves*, *ibid.*

(s) Per Le Blanc, J., *Chapman v. Greaves*, 2 Camp. 334; who said, that the general rule was, that no person who was a party to the record was admissible as a witness; and he distinguished between that case, where the witness was called to inculpate the defendants, and those (cited in the last note) where he is called to exculpate them; and said, that where there was an innovation he was not disposed to extend it.

(t) *Dormer v. Fortescue*, Mich., 9 Geo. 2; B. N. P. 285. But if he plead, and by that means admit himself to be a tenant in possession, the Court will not upon motion strike out his name; but *semble*, if he consent to let a verdict pass against him for as much as he is proved to be in possession of, he ought to be admitted as a witness for a co-defendant. B. N. P. 286.

(u) *Supra*, 133. *Spencer v. Goulding*, Peake, 129. *Duel v. Harding*, 1 Str. 595. *Lewis v. Fogg*, 2 Str. 944. *Cock v.*

Wharton, 2 Str. 1054. *Tullidge v. Wade*, 3 Wils. 18. *Green v. New River Company*, 4 T. R. 590; contra, *Dunsley v. Westbrowne*, 1 Str. 414.

(x) Per Lee, C. J., *East India Company v. Gosling*, B. N. P. 289.

(y) *Theobald v. Treggot*, 11 Mod. 262.

(z) 1 Salk. 289; B. N. P. 289.

(a) *Martin v. Horrell*, 1 Str. 647.

(b) B. N. P. 289.

(c) Fort. 247. *Ross v. Rowe*, 3 Ford's MSS.

(d) *East India Company v. Gosling*, B. N. P. 289; 3 F. 89. But (*semble*) this would be evidence without resorting to the exception from necessity.

(e) 1 P. Wms. 429. *Bent v. Baker*, 3 T. R. 27; Pr. in Ch. 207.

(f) *Dixon v. Cowper*, 3 Wils. 307. And see *Lloyd v. Archbuckle*, 2 Taunt. 324. Where the party employed to do work agrees to give half the commission to a third person, it is a mere sub-contract. *Gibbons v. Wilcox and others*, 2 Starkie's C. 45.

(g) *Benjamin v. Porteus*, 2 H. B. 590.

lien on the policy on which he has effected an insurance (*h*). So where the payee of a bill of exchange indorsed it in blank, and delivered it to an agent to procure acceptance, in an action of trover by the payee against the drawee, the agent is a competent witness to prove that he left the bill with him for acceptance (*i*). The rule seems to extend to all acts done by the agent, as far as he acts according to the direction of his principal in the usual course of business. But where an action is brought against the principal for the negligence of his agent, and evidence has been given of such negligence, the agent is in general incompetent without a release, for there the verdict against the principal would be evidence in an action brought by him against the agent (*k*), and the exception from necessity does not apply, because culpable acts of negligence and misconduct are not to be considered as arising in the common and ordinary course of dealing; they are not so usually confined as matters of trade and contract are, to the knowledge of the agent alone; and the agent himself stands in a very different situation; where the subject-matter of his testimony arises in the course of his ordinary employment, there is not so strong a reason to discredit him as there is where his misconduct is made the very ground of the proceeding, and where he would ultimately be responsible for the whole of the damages recovered. Accordingly in an action against the owner of a coach or vessel, for the negligence of the coachman or sailor, the latter are not competent for the defendant (*l*). In an action against the master of a ship for running down another, the pilot is not competent (*m*) without a release (*n*). So in action against the sheriff for the misconduct of the officer, the latter is not competent (*o*). So in an

(*h*) *Hunter v. Leathley*, 10 B. & C. 858.

(*i*) *Lucas v. Haynes*, Lord Raym. 871. Where the plaintiff sent goods to the defendant to sell on commission abroad, for which his agent in London had accepted a bill, and which was then lying dishonoured in the hands of plaintiff; held, that such agent was a competent witness to prove the sale of the goods. *Martineau v. Woodland*, 2 C. & P. 65.

(*k*) Vide *supra*, 115; and see 4 T. R. 590.

(*l*) 4 T. R. 590. In an action against an agent for purchasing goods of an inferior quality, Gibbs, L. C. J. rejected the testimony of the broker of the defendant, who was called to prove that he had pur-

chased goods of the best quality. *Gevers v. Mainwaring*, 1 Holt's C. 139. In general the principle is inapplicable, where the agent or servant has acted beyond the ordinary scope of his employment. It has been seen that previous to the late statute, one who had purchased goods in his own name was not a competent witness for the plaintiff (the vendor) to prove a sale to another. *Macbrain v. Fortune*, 3 Camp. 317. *Supra*, 112.

(*m*) *Martin v. Henrickson*, Ld. Raym. 1007; Salk. 287. *Green v. New River Company*, 4 T. R. 589.

(*n*) *Jarvis v. Hayes*, Str. 1803; *supra*, 115.

(*o*) *Powell v. Hart*, Ld. Raym. 1411. The reason given in the report is, that the

Agent.

action against the New River Company, to recover for damages done to a horse by the bursting of a pipe, after evidence that information had been given to a turncock, an agent of the defendant, as to the dangerous state of the pipe, which, had it been attended to, would have prevented the mischief, it was held that the agent was incompetent as a witness to disprove the negligence (*p*).

The rule in favour of admitting the testimony of an agent does not extend to one who is an agent merely in the particular transaction (*q*). It seems that, in general, where a proposed witness would otherwise be incompetent by reason of liability over to the party calling him for the amount recovered, competency is restored by an indorsement on the record, according to the late statute (*r*). One who has undertaken to execute particular work at a fixed price, and who in turn employs sub-agents to do the work, on an action brought by one of the latter against his principal, is a competent witness to prove that he, and not the defendant, employed the plaintiff(s), although he has been paid.

Bail.

Bail.—Neither the bail (*t*) nor the wife of one who is bail (*u*), nor one who has deposited money with the sheriff on the defendant's behalf in lieu of bail (*x*), is a competent witness for the defendant. Where one who is bail is a material witness for the defendant, the proper course is to apply to the Court to justify and substitute another bail (*y*).

Where the witness for the defendant on the *voire dire* admitted he was bail to the sheriff, but did not justify nor do anything to get his own recognizance discharged, but had heard that bail had justified; it was held that an examination on the *voire dire* did not let him in to give evidence of what he had heard, and that the explanation being insufficient, he was incompetent (*z*).

Corporator.—See Vol. II. tit. CORPORATION.

Costs.—Any engagement to pay the costs, or any portion of

Witness
liable to
costs.

officer has given a bond to the sheriff for his proper conduct; but he would be incompetent on the general principle, although no bond had been given.

(*q*) *Green v. The New River Company*, 4 T. R. 589. See *Mellor v. Falconer*, 1 Camp. 251; 15 East, 474; 3 Camp. 516; 2 Lord Raym. 1007.

(*r*) *Edmonds v. Lorce*, 8 B. & C. 408.

(*r*) And, *semble*, the same principle applies where the plaintiff calls his own agent.

(*s*) *Wilson v. Gellatly*, 2 Carr. & P. C.

467. Note, that the witness had become bankrupt, and had not obtained his certificate, and the money had been paid to his assignees.

(*t*) *Carter v. Pearce*, 1 T. R. 164.

Hawkins v. Inwood, 4 Carr. & P. 148.

(*u*) *Cornish v. Pugh*, 8 D. & R. 65.

(*x*) *Lacon v. Higgins*, 3 Starkie's C. 184.

(*y*) See Tidd's Practice, 282, 7th ed. *Whateley v. Fearnley*, 2 Chitty's R. 103.

(*z*) *Hawkins v. Inwood*, 4 Carr. & P. 148

them, on either side, creates an obvious interest on that side, and accordingly disqualifies the witness, but he may be rendered competent by a release by the attorney, or other person to whom he has engaged to pay the costs. And on this ground executors and trustees are in many instances excluded from giving testimony, although they have no private interest in the subject-matter of the suit, for they are still incompetent if they are legally liable to the costs of the suit (*a*). So one who has advanced money in support of a suit, for which security is given, partly on the thing demanded, is not competent, although the remaining security be sufficient to cover his demand (*b*). The prosecutor of an indictment which the defendant has removed by *certiorari* is competent, although entitled to costs, if the verdict be found in his favour; for otherwise a defendant might, by such a removal, exclude the prosecutor's testimony (*c*). Upon an indictment for non-repair of a road, the prosecutor is competent, although the Court has power to award costs in case the prosecution appear to be vexatious; for vexation will not be presumed, and the awarding costs is merely discretionary (*d*).

Witness
liable to
costs.

Although the contrary was once held (*e*), it is now fully settled that where a witness stands indifferent as to the sum claimed in a cause, his liability to one party for the costs by way of special damages renders him incompetent (*f*). One who has received money due from a defendant to a plaintiff is not a competent witness for the defendant to prove that he received the money as agent for the plaintiff or in his own right, if he has so conducted himself that he would in the event of a verdict for the plaintiff be liable over to the defendant, not only for the money received, but the costs of the action (*g*).

Creditor.—A creditor is a competent witness for an executor, to recover a debt due to the estate. The interest which he may have in increasing the estate is too uncertain to exclude his testimony (*h*).

Creditor.

(*a*) *Infra*, tit. INTEREST—TRUSTEE.

(*b*) Per Holt, C. J., *Norris v. Napper*, Ld. Raym. 1007, 8.

(*c*) *R. v. Muscott*, 10 Mod. 193.

(*d*) *R. v. Hammersmith*, 1 Starkie's C. 357. *R. v. Cole*, 1 Esp. C. 169.

(*e*) *Ilderton v. Atkinson*, 7 T. R. 480. *Birt v. Kershaw*, 2 East, 458, but questioned in *Townend v. Downing*, 14 East, 565.

(*f*) *Jones v. Brook*, 4 Taunt. 464. *Harman v. Lasbrey*, Holt's C. 390. *Edwards v. Lowe*, 8 B. & C. 407. *Larbalastier v. Clarke*, 1 B. & Ad. 902.

(*g*) Per Littledale, J. in *Larbalastier v. Clarke*, 1 B. & Ad. 899. Note, that he regretted that such a rule had been established, because in many cases it is difficult to ascertain whether a party so situated will be liable to answer for the costs.

(*h*) *Nowell v. Davies*, 5 B. & Ad. 368. *Davies v. Davies*, Mood. & M. C. 345. *Paull v. Brown*, 6 Esp. C. 34. And per McDonald, C. B. the creditor may give evidence for his debtor in his life-time, and is equally competent after his death. Ld. Ellenborough, in *Craig v. Cundell*, 1 Camp. C. 381, held that a creditor was

Creditor. A creditor of a bankrupt is not competent to increase the divisible fund (*k*). Here the funds are held by a trustee for the use of the creditors, to be divided rateably in proportion to their debts; they are, in effect, the creditors' own funds awaiting such division. But a creditor who has assigned his debt, though but by parol, is a competent witness to increase the fund out of which the debt is to be paid (*l*). Several creditors agree to contribute in *the usual way* to the expense of collecting the proceeds under a commission of bankrupt, that is, to contribute in proportion to their respective claims; an attorney employed by all having sued one, another who has paid his share is competent to prove the defendant's promise (*m*).

In criminal
proceed-
ings.
The party
injured

Criminal Proceedings.—It seems to be now settled that the party injured is a competent witness for the prosecution in all cases (*n*), unless some private compensation is given by a statute to the party injured, in the nature of the damages (*o*); for it is not to be presumed that a witness in a public prosecution is actuated by revengeful or improper motives, and he has in general no *legal* interest in the conviction beyond that of any other witness. It was formerly held, very generally, that the party defrauded was not a competent witness upon an indictment for the fraud, except in some instances *ex necessitate* (*p*); and, therefore, that the plaintiff was not competent to prove the perjury of the defendant in his answer (*q*) to a bill of the witness in equity.

not a competent witness for an executor, if it appeared that the estate was insolvent, although, as was urged, the interest was uncertain, and the executor might give a preference; but in the case of *Davies v. Davies*, Parke, B. ruled that an unsatisfied creditor was a competent witness for an administrator, under the plea of *plene administravit*; and the ruling in *Paull v. Brown* was confirmed by the Court in *Nowell v. Davies*. *Quære*, whether in such a case the question of the solvency or insolvency of the estate be material? According to the principle suggested by Macdonald, B. it seems not to be so, for in the case of a living debtor, the competency of the creditor would not be affected by the insolvency of the debtor. See the observations of Parke, J., 5 B. & Ad. 370.

(*k*) 2 Camp. 301. And *Shuttleworth v. Bravo*, Str. 507. Where the plaintiff sued two on a joint contract, and one pleaded his bankruptcy and certificate, held that by suing both, the plaintiff had

elected not to prove the debt under the separate commission, and that a verdict in that action could not affect the interests of the bankrupt's creditors, one of whom was therefore a competent witness to prove the joint contract. *Blammin v. Taylor*, 1 Gow's C. 199. A creditor is not a competent witness to deprive the bankrupt of his allowance. *Ib.* See Vol. II. tit. BANKRUPT.

(*l*) *Heath v. Hall*, 4 Taunt. 326. *Granger v. Furlong*, 2 Black. 1273.

(*m*) *Taylor v. Cohen*, 4 Bing. 53.

(*n*) An exception, which till lately existed, in the case of forgery, is removed by the stat. 9 Geo. 4, c. 32, s. 2. See Vol. II. tit. FORGERY.

(*o*) *R. v. Boston*, 4 East, 572; and see 4 East, 182. Gilb. L. Ev. by Loft, 221.

(*p*) Per Holt, C. J., *R. v. Macartney & others*, Salk. 286. Per Twisden, J., *R. v. Paris*, 1 Vent. 49. 1 Sid. 431.

(*q*) *R. v. Nunez*, 2 Str. 1043.

Such decisions seem to have been founded on the supposition that the verdict would be admissible evidence for the witness in a subsequent proceeding, so as to entitle him to a remedy for the injury, or to protect him against the effects of the fraud. But this doctrine has long been exploded (*r*); and it seems now to be perfectly settled that the record of conviction would not be admissible evidence in any civil proceeding. In the case of the *King v. Broughton* (*s*), which was a prosecution for perjury, founded on the defendant's answer to a bill in equity, Lee, C. J., notwithstanding the previous decisions (*t*), admitted the testimony of the plaintiff in equity; there, however, it appeared that the equity suit was at an end. But in the case of the *King v. Boston* (*u*), where perjury had been assigned on the defendant's answer, the plaintiff was held to be competent, although the equity suit was still pending. And this, on the ground that a court of equity would not look at a conviction founded on the testimony of the plaintiff, although it was also founded on other circumstances confirmatory of his testimony. Accordingly, the witness is competent upon an indictment for tearing a promissory note, payable to him (*x*), or for extorting a bond from him (*y*): upon an indictment for usury, although he was borrower of the money (*z*), and has not repaid it. So where money has been extorted from him under threat of imprisonment, or corporal injury (*a*); for cheating him of money by false pretences (*b*); so upon an information for fraudulently procuring the witness to execute a *cognovit* (*c*).

Competency of prosecutors.

Prosecutor in criminal proceeding.

A witness is competent notwithstanding an expectation that he shall in the event of conviction obtain a return of his goods, by virtue of a statute (*d*). And so he was in the case of an appeal of

Expectation of reward.

(*r*) See *Ld. Mansfield's* observations in *Abraham v. Bunn*, 4 Burr. 1229. And *Ld. Hardwicke's* in *R. v. Bray*, C. T. Hard. 359.

(*s*) 2 Str. 1229.

(*t*) *R. v. Whiting*, 1 Salk. 283. 1 *Ld. Raym.* 396. See *Cas. Temp. Hardw.* 359. *R. v. Nunez*, Str. 1043. *R. v. Ellis*, *Macnally*, 55. *R. v. Watt*, Hard. 331.

(*u*) 4 East, 572. And see the case of *Bartlett v. Pickersgill*, there cited, where the *Ld. Keeper* dismissed a petition for leave to file a supplemental bill in nature of a bill of review, the defendant having been convicted of perjury, committed in his former answer, on the evidence of the plaintiff.

(*x*) *R. v. Moise*, Str. 595. 1 Sid. 431. 1 Vent. 49, contrary to the opinion of *Twisden*.

(*y*) *R. v. Brent*, cited Ann. 268.

(*z*) *R. v. Sewell*, 7 Mod. 118.

(*a*) *Ibid*.

(*b*) *R. v. Macartney & others*, Salk. 286.

(*c*) *R. v. Paris*, 1 Sid. 431. 1 Vent. 49.

(*d*) At common law the owner was entitled to retake the goods, unless the property had been changed by waiver, seizure by the King, or sale in market overt. *East's P. C.* 759; *Gilb. Ev.* 222. By the stat. 21 Hen. 8, c. 11, the owner prosecuting

Reward. robbery, although the object is in part the recovery of his property.

The stat. 21 Hen. 8, c. 11, expressly directs restitution in cases where the felon shall be attainted by reason of evidence given by the party robbed, &c., or by any other by his procurement. The late stat. 7 & 8 Geo. 4, c. 29, s. 57, does not contain words which expressly recognize the competency of the party robbed to give evidence, but the object of the enactment is stated to be in order to encourage the prosecution of offenders; and it is manifest that to exclude the testimony of owners in such cases would have a contrary and prejudicial effect(*e*).

So a witness is competent although he expects a reward in case of conviction, by virtue of particular statutes (*f*), by proclamation, or in consequence of the voluntary offer of a reward which has been held out in order to ensure the apprehension and conviction of offenders(*g*); for these statutes were enacted for the express purpose of stimulating activity and diligence in the prosecution of offenders, and of rendering their conviction more certain; but the very opposite effect would take place if prosecutors and others were, in consequence of their expectation of such rewards, to be disqualified as witnesses; whence, it seems, the intention of the

the stealer of a horse to conviction is entitled to restitution, notwithstanding a sale in market overt. By the stat. 7 & 8 Geo. 4, c. 29, s. 57, if one be indicted for stealing, taking, obtaining, converting, or knowingly receiving any property by or on behalf of the owner of the property, or his executor, shall be convicted, the property shall be restored to the owner or his representative; and a summary power is given to the Court to award restitution. See further, Vol. II. tit. ACCOMPLICE—BRIBERY.

(*e*) See the observations of Bayley and Parke, Js. in the case of *R. v. Williams*, 9 B. & C. 560. It was held in that case that on an indictment for a forcible entry, the tenant was not competent, for he would be entitled to a writ of restitution. The case was distinguished from that of a prosecutor in felony, who would be entitled to restitution of goods on two grounds. The absence of provisions recognising expressly or by implication the competency of the owner in the former case, and less urgent necessity. The former seems to be the

better reason: for, as was observed by Ld. Ellenborough, in considering the effect of the Bribery Act, (which gives indemnity to a discoverer,) the statute give a Parliamentary capacitation to the witness, notwithstanding his interest in the result of the cause; for it is not probable that the Legislature would intend to discharge an offender upon his discovering another, so that the latter might be convicted, without intending that the discoverer should be a competent witness. 4 East, 183. And see Vol. II. tit. BRIBERY. The making competency to depend in such a case on the greater or less degree of urgency, affords no definite limit; it is rather for the Legislature than the Judge to draw a peremptory line.

(*f*) *R. v. Rudd*, Leach's C. C. L. 157. Haw. P. C. b. 2, c. 46, s. 135. Vol. II. tit. ACCOMPLICE. See also Vol. II. tit. BRIBERY.

(*g*) *R. v. Ld. G. Gordon*, Leach, 353. *R. v. Dylone*, On. N. P. 257. Esp. N. P. 713. *Rookwood's Case*, 4 St. Tr. 684.

Legislature may be inferred that such witnesses should still be deemed competent. In the case of appeals, the objection was never allowed to operate. At all events the admission of such testimony may be referred to the principle of necessity, which does not operate so powerfully in any other class of cases (*h*). Reward.

Where a reward is offered by any private person or body of persons, the witness would nevertheless be competent on another ground, since the public had an interest in his testimony previous to the offer of the reward, which could not be defeated by the voluntary act of any individual.

The principle lately adverted to applies also to cases where an indictment has been removed by *certiorari*; for if the prosecutor's claim to costs took away his competency, the act of parliament (*i*), which was intended to discountenance the removal of suits by *certiorari*, would give the greatest encouragement to such removals (*h*); besides, it seems to be clear that a defendant cannot by his own act cast an interest on the prosecutor so as to disqualify him (*l*). It seems also that the prosecutor of an indictment for not repairing a highway is competent, although he may in the result be liable to costs (*m*).

But in *all cases* the motive which may influence the mind of the witness is a matter for the consideration of the jury; and if they can infer from his situation or conduct that such motive is an improper one, they are at liberty to make deductions from the credit which they give to his testimony accordingly.

Where a statute gives a specific remedy to the party injured, he is as much disqualified as a witness in a criminal prosecution as if he sought the remedy by a civil action; and therefore, upon an indictment for perjury upon the statute, the party injured is not a competent witness, since the statute gives him 10*l.*, although he would have been a good witness upon an indictment for perjury at common law (*n*).

The former rule still prevailed with respect to indictments for the forgery of *negotiable instruments*, although it had been relaxed in other cases; and it was held (until the late statute) (*o*) that no one

(*h*) See the observations of Parker, C. J. in *The Queen v. Muscot*, 10 Mod. 193.

(*i*) 5 & 6 Will. & Mary, c. 11.

(*k*) Per Parker, C. J. 10 Mod. 194.

(*l*) Vid. *supra*, 129. At the York Spring Ass. 1821, the prosecutor of an indictment for not repairing a road, which

had been removed into the K. B. by *certiorari*, was examined without objection. See tit. HIGHWAY.

(*m*) See *R. v. Inhabitants of Hammer-smith*, 1 Starkie's C. 357.

(*n*) B. N. P. 289. 2 Haw. c. 46.

(*o*) See FORGERY.

could prove the forgery upon whom the instrument, supposing it to be genuine, would have been binding (*p*).

Devisee.

It has been held that a devisee who takes a vested interest under a will, of land, is not a competent witness in an action of ejectment brought by another devisee against the heir (*q*). As the judgment however would not be evidence either for or against the witness in a suit with the heir, this position seems to be untenable (*r*).

Executor.

An acting *executor* is competent to support the will by proof of the sanity of the testator, although he may become liable as an executor *de son tort* (*s*). So one who has acted under the first will is competent to prove a codicil setting up the first (*t*). And it seems that executors and trustees in general may be witnesses as to the trust estate, provided they take no beneficial interest (*u*); it has been decided so long ago as the time of Lord Hale, that an executor having no interest in the surplus is a good witness to prove the will in a cause relating to the estate (*x*), and this has been followed by many other decisions to the same effect.

In an action against an administrator, one of his sureties for the due administration of the effects is a competent witness to defeat the action (*y*); for the bare possibility that an action will be brought is no objection to competency, and in order to disqualify a witness it is necessary to show that he will derive a certain benefit from the result, one way or other (*z*); even a creditor of

(*p*) *R. v. Dodd*, Leach, 184, 3d edit. Hard. 332, pl. 7. 3 Salk. 172, pl. 4. Co. Litt. 352. 2 Ins. 39. *R. v. Russell*, Leach, 8. *R. v. Rhodes*, Str. 728. Salk. 283. *Shank v. Payne*, Str. 633. *Caffy's Case*, East's P. C. 995. Hard. 351. Vol. II. tit. FORGERY.

(*q*) *Pyke v. Crouch*, 1 Lord Raym. 730; in *Helliard v. Jennings*, on an issue of *devisavit vel non*, it was assumed that a devisee was incompetent.

(*r*) An executor who takes a pecuniary interest under a will is a competent witness to support the will in an ejectment brought by the heir-at-law. *Doe v. Teage*, 5 B. & C. 335. So in *Doe v. Maisey*, 1 B. & Ad. 439, it was held that the mother of the defendant in ejectment, who claimed as heir-at-law of his father, was competent for the defendant, for the record would be no evidence of the father's seisin to entitle the widow to dower; and that if he was

seised, she would be entitled, whether the lands were in the possession of the lessor of the plaintiff or the defendant.

(*s*) *Goodtitle v. Welford*, Doug. 134. See 1 P. Wms. 287. 1 Bl. Rep. 365. Mod. 107. 3 Will. Rep. 181. 1 Barnard, 12.

(*t*) *Baylis v. Wilson*, cited Burr. 2254.

(*u*) 1 Mod. 107. 1 P. Wms. 290. *Goodtitle v. Welford*, Doug. 134. *Heath v. Hall*, 4 Taunt. 328. *Phipp v. Pitcher*, 6 Taunt. 220. *Bettison v. Bromley*, 12 East, 250.

(*x*) Per Lord Ellenborough in *Bettison v. Bromley*, 12 East, 253. In that case it was held, that the wife of an executor who took no beneficial interest under the will, was a credible witness to the will under the statute. See tit. WILL.

(*y*) *Carter v. Pearce*, 1 T. R. 163.

(*z*) Per Buller, J. *ibid*.

the administrator's, which is a stronger case, would be a competent witness (*a*).

A creditor is a competent witness for an administrator to prove due administration, by payment of a debt to himself (*b*).

The heir apparent is a competent witness as to the estate, for he has no present legal interest; but a remainder-man is incompetent (*c*). Heir at law.

Where an informer, upon the conviction of the offender under a penal statute, is entitled to the whole or to any part of the penalty, he is obviously interested, and therefore incompetent (*d*). Informer.

Where the statute gave one half of the penalty to the informer, and the first witness proved the commission of the offence, and also that no other person had given information, he was held to be incompetent (*e*).

The objection does not apply where the penalty can be recovered only by a distinct proceeding, in which the conviction would not be evidence (*f*).

An inhabitant of a county or other district upon which any duty is thrown, to which the witness is bound to contribute, is not competent to give evidence in discharge or alleviation of the burthen. Accordingly it was held, that a party who was liable to a county-tax for the support of the suit was incompetent (*g*). Inhabitant. County.

By the stat. 1 Ann. c. 18, s. 13, inhabitants are competent witnesses upon indictments against private persons for the non-repair of a bridge (*h*).

In an action against the hundred (*i*), an inhabitant was made competent (*k*) by the stat. 8 Geo. 2, c. 16, s. 15.

(*a*) Per Buller, J., *Carter v. Pearce*, 1 T. R. 163. And see Vol. II. tit. EXECUTOR.

(*b*) Vol. II. tit. EXECUTOR.

(*c*) *Smith v. Blackham*, 1 Salk. 283.

(*d*) *R. v. Tilley*, Str. 316. *R. v. Stone*, 2 Lord Raym. 1545. *R. v. Piercy*, Andr. 18. *R. v. Bluney*, Andr. 240. *R. v. Cobbold*, Gilb. 111. *R. v. Shipley*, Gilb. 113. *Portman v. Oakden*, Say. 179. In the case of *The King v. Teasdale*, 3 Esp. C. 68, upon an indictment under the st. 21 Geo. 3, c. 37, s. 31, an informer was held to be competent on a presumption, as it seems, that the Legislature, in imposing penalties, meant to admit the testimony of informers, as being essential to effectuate the provisions of the statute. The principle is not satisfactory, and occasions difficulties, which might easily be avoided by an express provision.

(*e*) *R. v. Blackman*, 1 Esp. C. 96.

(*f*) As in a prosecution under the stat. 9 Ann, c. 14 s. 5, by the loser of money at cards. *R. v. Luckup*, Willes, 425, n. (*c*); or on an indictment (st. 23 Geo. 2, c. 13, s. 1), for seducing artificers. *R. v. Johnson*, Willes, 425, n. (*e*). And see the observations of Bayley, J., 9 B. & C. 557.

(*g*) *County of Salop v. County of Stafford*, 1 Sid. 192; 2 Lev. 231.

(*h*) Vol. II. tit. BRIDGE. Before the statute such evidence seems to have been admitted on a principle of necessity. Gil. Ev. 113; 2 Show. 47; 1 Vent. 351.

(*i*) On stat. of Winton. 13 Edw. 1, st. 2, c. 1. See Vol. II. tit. HUNDRED.

(*k*) He was before the statute held to be incompetent, even although he paid no taxes or parish duties, because he might

Inhabitant. So in settlement cases, a *rated* inhabitant formerly was incompetent to give evidence for his own parish (*l*) as to the pauper's place of settlement; neither could he give evidence to extend the boundaries of his parish (*m*); so before the stat. 27 Geo. 3, c. 29, a rated parishioner was incompetent to give evidence in any proceeding for a penalty given by any statute to the poor of the parish (*n*). For although, in the case of *Townsend v. Row* (*o*), it was held that a parishioner was competent to support the title to an estate, where the remainder, after an estate for life, was limited to the minister and churchwardens for the use of the poor of the parish, yet this was decided upon the untenable ground that the interest was too minute to disqualify the witness (*p*). But by the statute above referred to, it is enacted, that an inhabitant of any place or parish shall be a good witness, although a penalty accrue to the poor, provided such penalty do not exceed 20*l.* (*q*).

By the stat. 7 & 8 Geo. 4, c. 29, s. 64, and 7 & 8 Geo. 4, c. 29, s. 29, upon summary convictions, the evidence of the party grieved is to be admitted in proof of the offence; so also is the testimony of any inhabitant of the county, riding, or division in which the offence shall be committed, notwithstanding any penalty or forfeiture in respect of the offence may be payable to the general rate of such county, riding, or division. But in the case of the party grieved giving such evidence, he is not to receive any portion of the penalty.

By the stat. 3 & 4 Will. & Mary, c. 11, in all actions brought, either in the Courts at Westminster or at the assizes, for money mis-spent by the churchwardens, the evidence of the parishioners, with the exception of those who receive alms, shall be admissible.

And by the stat. 54 Geo. 3, c. 170, s. 9, it is enacted, that no person rated or liable to be rated to any rates or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be

be liable when the tax came to be levied. 2 Keb. 73. Mod. 73. But see the cases cited below. And now see the late stat. 7 & 8 Geo. 4, c. 31, s. 5.

(*l*) *R. v. Prosser*, 4 T. R. 17. *R. v. South Lynn*, 5 T. R. 664. *R. v. Little Lumley*, 6 T. R. 157.

(*m*) *Deacon v. Cooke*, cited 2 East, 559.

(*n*) 1 Sess. Cases, 874, cited Say. 180.

(*o*) 2 Sid. 109.

(*p*) But see 2 Vern. 217. See also *Jer-*

vis v. Hay, 3 F. 182, 10 Geo. 2, where, in an action under the game laws, a parishioner was held to be competent. There Lee, C. J., cited *Phillips v. Scallard*, 6 Geo. 2, in C. B., where in a similar case a new trial was moved for, and the Court were of opinion that the witness ought to have been admitted. But see 1 Barnes, 435, where it appears that the new trial was moved for on a different ground.

(*q*) *R. v. Davis*, 6 T. R. 177.

deemed and taken to be by reason thereof an incompetent witness Inhabitant. for or against such district, &c. in any matter relating to *such rates(r)* or *cesses*, or to *the boundary* between such district, &c. and any adjoining district, &c.; or to any *order of removal* to or from such district, &c.; or *the settlement* of any pauper in such district, &c.; or touching any *bastards chargeable*, or likely to become chargeable to such district, &c.; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the *election or appointment* of any officer or officers; or the *allowance of the accounts* of any officer or officers of any such district, &c.

Before this statute a rated parishioner was incompetent in settlement cases, but a non-rated inhabitant was competent, although he had been left out of the rate for the express purpose of making him a witness (s); and it was competent to him to discharge himself on the *voire dire* without producing the rate-book (t). But both before and after the declaratory statute 46 Geo. 3, c. 37 (t), a rated inhabitant was considered to be a party to the suit, and

(r) It has been held that a rated inhabitant is a competent witness for the defendants in an action of trespass brought against them as overseers, in respect of land claimed by them as trustees for the benefit of the parish in aid of poor's rates, the pleas being the general issue, and *liberum tenementum*: for the intention of the Legislature was to make rated parishioners competent in all matters relating to rates. *Meredith v. Gilpin & others*, 6 Price, 146. And one who occupies rateable property within a chapelry, is a competent witness to prove that a certain messuage is situated within the chapelry. *Marsden v. Stansfield*, 7 B. & C. 815. So an inhabitant is competent in an action by the surveyor of the highways against his predecessor for penalties. *Hendebourch v. Langston*, 1 Mood. & M. C. 402. The statute, it has been said, extends to render inhabitants competent witnesses in questions as to the repair of highways. *R. v. Hayman*, 1 Mood. & M. C. 401. But this case was expressly overruled by Bolland, B., on the Northern Summer Circuit, 1833, and since by the Court of King's Bench, in *R. v. Bishop Auckland*, 1 Ad. & Ell. 744. In the case of *Oxenden v. Palmer*, 2 B. & Ad. 236, the Court of King's Bench doubted as to the correctness of the decision in

Meredith v. Gilpin; and it was held that a question as to the existence of a custom to take shingle from the sea-beach for the purpose of repairing highways within the parish, was one which did not properly and strictly relate to rates or cesses of the parish, within the meaning of the Act. In *Tothill v. Hooper*, 1 Mood. & R. C. 392, Lord Denman, C. J., ruled in an action against an overseer (who defended under an order of vestry), for medical attendance on a pauper, that a rated inhabitant who had signed the order was not competent. But an occupier of *rateable* property was held to be a competent witness for parish officers, in an ejectment brought by them to recover a parish house. *Doe v. Cockerill*, 6 C. & P. 525; 4 Ad. & Ell. 478. And in the later cases of *Doe d. Boulbee v. Adderley*, and *Doe v. Bowles*, 8 Ad. & Ell. 502, the case of *Oxenden v. Palmer* was overruled, and that of *Meredith v. Gilpin* supported. And now see the statute 3 & 4 Vict. c. 26, *infra*, 161.

(s) *R. v. Kirdford*, 2 East, 550. But see *Rhodes v. Ainsworth*, 6 B. & A. 87; 2 Starkie's C. 215.

(t) See the Act below. *R. v. Prosser*, 4 T. R. 17. *R. v. Little Lumley*, 6 T. R. 157.

Inhabitant. consequently he could not be examined by the adverse party without his consent(*u*). But being so far a party, it followed that his declarations were admissible in evidence(*x*), although he had not refused to be examined(*y*).

The statute 54 Geo. 3, c. 170, having rendered a rated inhabitant a competent witness for his own parish, it becomes a question whether his declarations can be proved by the adverse parish, without calling him as a witness(*z*).

Parish-
louer.

The rated inhabitants of a parish are in general incompetent witnesses to discharge the parish from the burthen of repairing a highway(*a*); and it is said to have been held by Lord Kenyon, that a mere inhabitant, although he occupied no land within the parish, was incompetent on the trial of an issue, on a plea by the inhabitants that one Robinson was bound to repair the road in question *ratione tenuræ*; because if there should be a verdict against the defendants the witness would be liable to the payment of the fine, and also because every inhabitant is liable to do statute duty(*b*).

(*u*) *R. v. Woburn*, 10 East, 394. *R. v. Inhabitants of Hardwicke*, 11 East, 579. Note, in *R. v. Kirdford*, Lord Kenyon distinguished the case of a non-rated inhabitant in a settlement case from that of a hundredor under the statute of Hue and Cry, on the ground that the latter was a party.

(*x*) *R. v. Inhabitants of Hardwicke*, 11 East, 579.

(*y*) *R. v. Whitley Lower*, 1 M. & S. 636. In *R. v. Inhabitants of Hardwicke* the rated inhabitant refused to be examined, but the refusal does not appear to constitute a material ingredient in the case; for where in general the declaration of a party is evidence by way of admission, it is unnecessary, as a preparatory step, to call the party as a witness.

(*z*) Doubts have been entertained on the question, and I am not aware that the point has been decided. Before the stat. 54 Geo. 3, c. 170, such a declaration was admissible, on the ground that the declarant was a *party to the suit*; and the effect of that statute seems to be merely that of conferring competency, notwithstanding interest, without farther interfering with the rules of evidence on the particular subject. And it seems to be going a great length to contend, that, because a party

may be a witness in his own cause, notwithstanding his interest, that therefore the adversary shall be deprived of the benefit of his declarations. The main argument which was urged against the reception of the evidence, viz. that it was not the best evidence, appears to be a very fallacious one, for the whole doctrine of receiving admissions of parties in evidence, is built on the ground that such admissions and declarations are better evidence of the truth than the testimony of the party himself, examined upon oath. The case most analogous to the present is that of a plaintiff in an action against the hundred, on the statute of Winton; he is a competent witness notwithstanding his interest, and yet his declaration would surely be admissible in evidence for the hundred.

(*a*) 4 Mod. 48, 49; vide *supra*, 159 (*r*). 15 East, 474. 1 B. & Ald. 66. Statute duty is repealed, and now see the provisions of the late stat. 3 Geo. 4, c. 126, s. 137, as to turnpike roads, and 5 & 6 Will. 4, c. 50, s. 100, as to highways not turnpike. Vol. II. tit. HIGHWAYS. An inhabitant being a defendant, is not a witness, on indictment for non-repair of road. *R. v. Shoreditch*, Vin. Ab. *Chemin*, 508, pl. 16.

(*b*) *R. v. Inhabitants of Wheaton Aston*, cor. Lord Kenyon, Stafford Summer Ass.

So the owner of an estate within a chapelry in lease to a tenant who was rated for the repairs of the chapel, and bound to pay the rates without deduction, was held to be incompetent to negative the liability of the inhabitants (c).

Joint interest.

But now by the late stat. 3 & 4 Vict. c. 26 (d), s. 1, it is enacted, sec. 1, that no person called as a witness on any trial shall be disabled from giving evidence by reason only of such person being the inhabitant of any parish or township rated or assessed, or liable to be rated or assessed to the relief of the poor, or for or towards the maintenance of church, chapel, or highway, or for any other purpose whatever. And by sec. 2, no churchwarden, overseer, or other officer in, and for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid, shall be disabled from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party thereto, or liable to costs in respect thereof, where he shall be only a nominal party to such trial, &c., and shall only be liable to contribute to such costs in common with other rate-payers.

Insolvent.—See Vol. II. tit. INSOLVENT.

Joint Interest.—In general, a witness is not incompetent *merely* in respect of any interest he may have in the subject-matter of the suit, being a stranger to the parties. For whatever be the result, he will not be liable to costs or damages, and the verdict and judgment would not be admissible either for or against him in any other proceedings to affect his own title (e).

Joint interest in subject-matter.

Previously to the application of the principles above announced to cases where the witness is affected, or supposed to be affected, by some joint interest with a party to the suit, or in the subject-matter of the suit, it will be convenient to premise a few general observations, recapitulating briefly some of the rules already obtained, and which are more particularly connected with the large class of cases now under consideration. A witness is to be excluded when he stands in such a situation that it would be more

1797, cited as from the MSS. of Serj. Williams, in Chetwynd's Burn's J. tit. EVIDENCE, 792. S. C. not S. P. 2 Saund. 159 (a).

(c) *Rhodes v. Ainsworth*, 1 B. & A. 17; 2 Starkie, C. 215. But mere liability to be rated has been deemed to be insufficient to disqualify. *R. v. Prosser*, 4 T. R. 17. *R. v. South Lynn*, 5 T. R. 664. Although the name of the party was omitted for the

very purpose. *R. v. Inh. of Kirdford*, 2 East, 559; and see 4 T. R. 36.

(d) This statute has rendered many of the preceding observations (written before it was passed) unnecessary.

(e) For illustrations of this principle, see above, 118; and the cases *Nix v. Cutting*, 4 Taunt. 18. *Ward v. Wilkinson*, 4 B. & Ald. 410.

Joint interest.

to his interest to give his evidence one way than the other, for he then labours under a temptation to conceal the truth or state what is false. But to warrant the exclusion, it is not sufficient merely to suggest that a proposed witness is so situated; the fact must be established either by admission or by proof⁽ⁱ⁾. Here a distinction arises as to such admission or proof.

Where the situation of the witness, so far as regards the question of interest, is completely established, there can seldom be any doubt on the question of competency or incompetency; but it often happens that the situation of the witness is the material question in the cause; to assume the fact either way would be to assume the whole question in dispute; to exclude the witness till the fact were determined by evidence, would in effect be to reject his testimony, although in fact he might be disinterested; to admit his testimony either on the *voire dire* or in chief would frequently be to admit the testimony of an interested party. In such cases, the same principle is applicable as in other cases. To warrant the rejection of the witness, his situation must be so far established as to show that he would be benefited by representing what was disputed in one way rather than another. This happens particularly in respect of cases of frequent occurrence, where a material question in dispute is whether the proposed witness is himself liable to the plaintiff's demand, or being liable to a part at least, whether some other is not jointly liable. If in the former case it be made to appear, by examination of the witness on the *voire dire* or otherwise, that he was *primâ facie* liable to the plaintiff's demand, his interest at that point in procuring the plaintiff to recover from another a demand which he was under a *primâ facie* liability to satisfy, would be manifest; he would labour under a temptation to acquit himself of his *primâ facie* responsibility. A similar objection would apply where the witness's liability to the demand in part being admitted, and the question being whether the defendant was or was not jointly liable, the witness would have an interest in increasing the number of those liable to contribute.

Formerly the distinction between an interest in a particular *fact* or question abstractedly, and an interest in the *event* of the particular cause then pending, was not sufficiently attended to; wit-

(i) In an action for goods sold and delivered, the general issue being pleaded, a witness was admitted to prove that credit was given to her alone; and she was ad-

mitted by Eyre, C. J. to prove this, notwithstanding the suggestion by the plaintiff that the defendant and the witness were partners.

nesses who were interested in the transaction or question abstractedly, but who had no interest in the immediate event of the action, were held to be incompetent. Thus it was held, that the master of a vessel, who had insured goods on board, was not competent for the plaintiff in an action by the owner of other goods on a policy effected on them (*k*); that is, he was held to be incompetent as a witness for the plaintiff, because he had an interest in the question whether an insurance on goods could under the circumstances be enforced, although he had no interest in the particular goods insured in that action, and although the result of that action would be in point of law perfectly irrelevant in a proceeding to recover on his own insurance. Such a decision would no longer be supported, the proper test of competency being the interest which the witness has in the immediate event of the particular suit, or in the record, for the purposes of evidence (*l*), and any collateral or incidental connection of the witness with the transaction, although it might tend to influence or prejudice his mind, is immaterial. Consequently, a co-underwriter is a competent witness for the defendant in an action upon the policy (*m*). So one mariner may prove wages to be due to another for the same voyage in respect of which he himself has a claim (*n*).

Joint interest.

A joint purchaser of an annuity, as tenant in common with the plaintiff, is competent in an action against a conveyancer for negligence and fraud in the negotiation of the annuity (*o*). So it seems to be clear, that any person who has received any distinct injury from the act of the defendant complained of in the action, is a competent witness to prove the plaintiff's case, since the recovery by the plaintiff would not tend to establish his own case.

So one who has purchased a number of copies of the plaintiff's work, which he is printing, is competent to prove a contract by the defendant to insure it from fire (*p*).

In an action of covenant against Backhouse, the part owner of a ship, jointly with Foulstone, to reimburse the ship's husband for sums paid for insurance, the plaintiff having brought a similar action against Foulstone, the plaintiff adduced evidence to show

(*k*) *Rock v. Layton*, Fort. 246. And see *Skinner*, 174, where, in an action brought by a master of a ship against custom-house officers for refusing to clear the ship, it was held that the owner of goods on board was not competent.

(*l*) *Bent v. Baker*, 3 T. R. 27. *Ridout v. Johnson*, B. N. P. 283.

(*m*) *Bent v. Baker*, 3 T. R. 27.

(*n*) *Skinner*, 174.

(*o*) *Rothery v. Howard*, 2 Starkie's C. 68.

(*p*) *Mawman v. Gillett*, 2 Taunt. 325. *Lloyd v. Archbottle*, Ib. 324.

Joint interest.

that Foulstone ordered the insurance, and that the defendant approved of it; the Court held that Foulstone was incompetent to prove that the defendant never knew of the insurance, because on the plaintiff recovering against the defendant, Foulstone would be liable for half the sum recovered (*r*). The ground of decision there was, that had the plaintiff recovered, the witness would have been liable to half the damages. This, however, would not, it seems, have been the consequence; in the subsequent case of *Walton v. Shelley* (*s*), it was observed by Mr. Justice Buller, that the witness, in the event of a recovery by the plaintiff, would have been liable to no part of the damages.

In general where it is admitted or proved that the proposed witness has a joint interest with the party who calls him, either in the subject-matter to be recovered, or in the contract as a general partner, joint or part owner, or joint contractor, by which he has an interest in the very thing claimed, or in the money to be recovered (*t*), or in the costs incidental to the suit, he is incompetent to give evidence for that party (*u*). Upon issue taken on a plea in abatement, that an alleged co-contractor ought to have been joined, the latter is incompetent to give evidence for the defendant (*x*).

(*r*) *French v. Backhouse*, Burr. 2727.

(*s*) 1 T. R. 296. 303.

(*t*) On an information in the Exchequer upon a seizure of goods by a custom-house officer, another officer was held to be incompetent, because he had made an agreement with the former to share in all seizures, although he conceived the agreement to be illegal, and did not expect any benefit from the seizure in question. *R. v. Walker*, 1 Ford's MSS. 145.

(*u*) This rule, includes all general partners, joint contractors, corporators who are certified to any private interest. See tit. CORPORATION. Commoners in a question as to a right of common. See tit. COMMON.

(*x*) *Hare v. Munn*, 1 Mood. & M. C. 241, note (*a*); and see *Robinson v. Hudson*, 4 M. & S. 475. And *Young v. Bairner*, 1 Esp. C. 103, where, in an action against a part-owner of a ship, for work done to the ship, and issue taken, on a replication to a plea in abatement, that the defendant had undertaken solely to pay, Lord Kenyon held that Whytock, a joint-owner, was not a competent witness to prove that he gave the order, because he

would be liable in contribution to the defendant in case the plaintiff recovered. As a partner, however, it seems that he stood indifferent, since according to the principle laid down in *Hudson v. Robinson*, 4 M. & S. 475, he would ultimately be liable to his own share only. The question seems to have been whether he would not by his testimony get rid of a share of the costs. The Court of King's Bench held that he was at all events rendered competent by a release.

In *Goodacre v. Breame*, Peake's C. 174, the plaintiff having proved the sale of the goods to the defendant, and to *J. S.* his partner in trade, Lord Kenyon held that *J. S.* was not competent to defeat the action, by evidence that the goods were sold to himself, and that the defendant was merely his servant, since he would by his evidence discharge himself from a moiety of the costs. See also *Baker v. Tyrwhitt*, 4 Camp. 47. *Hall v. Rex*, 6 Bing. 181. *Evans v. Yeatherd*, 2 Bing. 133. *Simons v. Smith*, 1 Ry. & M. C. 29. *Cheyne v. Coops*, 4 Esp. C. 112. *Supra*, 111. And tit. PARTNERS, and VENDOR AND VENDEE.

Although in all such cases the party so interested is incompetent, a distinction arises on the question of restoration to competency, by an indorsement on the record, according to the late statute. Wherever the proposed witness has such an interest as a general partner, or as a joint-owner of specific property, that he would be immediately benefited by a verdict and judgment (*y*) in favour of his party, such an indorsement would be unavailable to restore competency, for the benefit would be immediate, and not dependent on any use to be made of the record. But where the benefit would not be immediate, and could not be attained without making use of the record, it seems that an indorsement would restore competency, for the record being silenced, which was essential to the witness's gain or loss, his interest would cease.

Joint interest.

The class of cases where the liability of the witness is a material fact in dispute will now be adverted to.

Where the question is whether a proposed witness has or has not any joint interest, and the matter rests merely in assertion on the one side or other, without proof that he stands in an interested position, he seems to be competent.

Where a defendant in *assumpsit* pleads the non-joinder of another, whom he alleges to be a co-contractor, in abatement, on issue taken on the fact, the alleged co-contractor is a competent witness for the plaintiff (*z*). A witness is not to be excluded by a mere suggestion, without proof that he stands in an interested position; and even assuming him to be a partner, he has no interest in favour of the plaintiff as regards costs. He has indeed an interest in procuring a verdict for the defendant, to whom he would otherwise be liable for his share; and as regards the joint claim, he would stand indifferent; for if jointly liable with the defendant, he is liable, at all events, to his own share and no more.

Where the proposed witness's joint liability is admitted, and the question is whether the defendant be or be not jointly liable with him, he is interested as a witness for the plaintiff in procuring a verdict for the latter, and so to make the defendant contribute.

It has accordingly been held that a co-defendant in *assumpsit* who has let judgment go by default, is not a competent witness for the plaintiff to prove the liability of the other defendants; for being himself liable he is interested in rendering the defendants liable to contribution (*a*). It has however been held that a co-partner is a competent witness in an action of *assumpsit* to prove

(*y*) This is, of course, to be understood of an executed judgment, by which the proposed witness would gain or lose.

(*z*) *Robinson v. Hudson*, 4 M. & S. 475.

(*a*) *Brown v. Brown*, 4 Taunt. 752.

Note, that in this case the record would be

Joint interest.

the liability of the defendant as a co-partner (*b*), principally, as it seems, on the ground that even in case the defendant were not jointly liable the witness would gain nothing by his perjury, because the defendant would recover against the firm the whole amount of the debt and costs, as for money paid to their use. If this were otherwise, competency would, it seems, be restored by a release from the plaintiff to the witness; for in that case the witness, if he were in fact solely liable, would be rather interested in procuring a verdict for the defendant than for the plaintiff; if the plaintiff succeeded, the witness might possibly be liable over to the defendant, but if the defendant succeeded the witness would be liable to neither. It seems that an indorsement on the record would not protect the witness against an action by the plaintiff to recover the whole amount, in case he failed to recover from the defendant, for the plaintiff would recover independently of the records.

Where the proposed witness is under a *primâ facie* liability to the demand, and is called as a witness on the part of the plaintiff to charge the defendant with it, he is, as has been seen, incompetent (*c*). He procures a debt to be paid by another to which he is *primâ facie* liable; and in case the plaintiff afterwards sought to recover the same demand against the witness the record would be evidence in defence (*d*). A party so situated would also be incompetent to prove that the defendant was jointly liable to a part of the demand (*e*).

It seems that in general a release by the party to a witness whom he calls to charge another with an obligation, to which the witness is *primâ facie* liable, would restore competency, for on such release given the witness would be more benefited by the defeat than the success of his party. For, in the former event neither the plaintiff nor defendant could have any claim against him; but in the latter, although he could no longer be liable to the plaintiff, by reason of the release, he might possibly be liable to the defendant for money paid to his the witness's use. And it seems that an indorsement on the record would have the same effect. The interest of a witness so situated does not consist simply in the moral probability that a plaintiff who has recovered the amount of his demand from the defendant will not afterwards

evidence; and Abbott, C. J., in *Blackett v. Weir*, 5 B. & C. 287, attributed the exclusion to the technical rule that the plaintiff could not call a co-defendant on the record.

(*b*) *Blackett v. Weir*, 5 B. & C. 385.
So one of three joint obligors is competent

to prove the execution of the bond. *Lockhart v. Graham*, Str. 35. And see the cases *supra*, 110, 111.

(*c*) *Supra*, 112.

(*d*) *M'Brain v. Fortune*, 3 Camp. 317.

(*e*) *Riply v. Thompson*, 12 Moore, 55.

proceed against the witness; for that is but conjectural. The question is, whether a legal advantage is gained; and that can only be by means of the verdict and judgment, as having a legal operation, or as evidence; and they can have neither but by the record, which is silenced by the indorsement.

Joint interest.

An interest arising out of an illegal agreement, will not render the witness incompetent, for it is void (*f*).

As to the interest of *landlords and tenants*, see tit. EJECTMENT.

A residuary legatee is not a competent witness for the executor in an action by the latter to increase the estate (*g*), nor in one against the executor, for the judgment would afterwards be evidence against him (*h*). So one entitled to a distributive share of an estate is not a competent witness in an action by (*i*) or against (*h*) the administrator, to benefit the estate. A legatee of a specific legacy who has been paid the amount of his legacy before the trial, is a competent witness to increase the estate (*l*), and so, as it seems, he is although the legacy has not been paid (*m*). In an action by the executor, it is not sufficient that the residuary legatee should release the debt in question; for the plaintiff, though not liable to pay the defendant's costs in case of failure, is liable to pay costs to his own attorney, the effect of which would be to diminish the residue (*n*). An executor and residuary legatee is competent in an action against the legatee of a specific chattel by one claiming, as owner, to prove the property to be the tes-

Legatee.

(*f*) A member of a society undertaking to contribute towards all law expenses respecting it, was held a competent witness in an action brought against the secretary for a libel: if the agreement were to contribute towards bearing each other harmless in doing wrong, it would be void: *Humphrey v. Miller*, 4 C. & P. 7.

(*g*) *Baker v. Tyrwhitt*, 4 Camp. 27; and per Tindal, L. C. J., 6 Bing. 394.

(*h*) See 2 Starkie's C. 546.

(*i*) *Mathews v. Smith*, 2 Y. & J. 426.

(*k*) *Allington v. Bearcroft*, Peake's Add. C. 212.

(*l*) *Clarke v. Gannon*, 1 Ry. & M. C. 31. *Sewell v. Stubbs*, 1 Carr. & P. C. 73. The objection was that the witness would be obliged to refund in case the estate should prove deficient; but Lord Tenterden observed, that there was nothing to show that the funds were insufficient, and that, although the debt sought to have been re-

covered had not been paid, it was not to be assumed that there was not some other sufficient estate.

(*m*) See the last note. In the case of *Nowell v. Davies*, 5 B. & Ad. 308, it was held that an annuitant under a will was a competent witness for the executors in an action for a debt due from the testator. In *Johnson v. Baker*, 2 C. & P. 209, a Legatee who had not been paid was admitted as a witness for the executor in an action against the latter; but there the debt was not recoverable out of the estate.

(*n*) *Baker v. Tyrwhitt*, 4 Camp. C. 27. The executor would be entitled to the costs out of the estate, the action being brought *bonâ fide*. The witness therefore cannot be made competent but by releasing the residue, or by a release of the costs by the plaintiff's attorney to the witness. And see *Perryman v. Steggel*, 8 Bing. 369. *Carter v. Abbott*, 1 B. & C. 144.

tator's at the time of his death (*o*). With respect to the competency of a legatee, as an attesting witness to a will, see tit. WILL.

Party.

Parties (p).—Partners.—Policy of Insurance. See those titles.

Prochein
ami.

Prochein ami.—A father or guardian who supports the expense of an action by his infant son, for an assault, is not competent, because he is liable to costs (*q*); and for the same reason, any other who sues as *prochein ami* is incompetent (*r*).

Prosecutor.—See tit. CRIMINAL PROCEEDINGS, *supra*, 152.

Sheriff.—See tit. SHERIFF.

Surety.

Surety.—Where a surety would be immediately liable in case of a verdict against the principal, his interest is obvious, and therefore one who is bail is incompetent in an action against his principal (*s*). So where *A.* gave a bond to indemnify *B.*, a candidate, against the expenses of an election, to a certain extent, and *C.* brought an action against *D.* for money expended at the election on *B.*'s account, it was held that *A.* was not competent to defeat the action by showing that the defendant was an agent only; since if the defence failed, the defendant would recover against the candidate, and the candidate against *A.*; and it was held to be no answer, that in case the defendant succeeded the witness would still be liable to the candidate, because in that event he would be liable for a portion of the bill only, and not for the costs of the action (*t*). But the co-obligor of a bond to the ordinary, under the stat. 22 & 23 Ch. 2, is competent to prove a tender by the administrator, because there is but a bare possibility that an action will be brought against the witness, and therefore the case of the witness differs from that of bail, who are directly and immediately interested (*u*).

Trustee.

Trustee.—A mere trustee is competent without a release, and it is no objection that he may be sued as an executor *de son tort* (*x*).

(*o*) *Bowman v. Willis*, 3 Bing. N. C. 639.

(*p*) Their competency will be separately considered, since it depends upon other considerations besides that of interest.

(*q*) *Hopkins v. Neale*, Ann. 202. 2 Str. 1026. *James v. Hatfield*, 1 Str. 548. 1 Cox's Cases in Chan. 286. *Head v. Head*, 3 Atk. 511–547.

(*r*) *Ibid.* *Clutterbuck v. Lord Huntington*, 1 Str. 506.

(*s*) See *Goss v. Tracy*, P. Wms. 288. *Supra*, tit. BAIL.

(*t*) *Trelawney v. Thomas*, 1 H. B. 303.

(*u*) *Carter v. Pearce*, 1 T. R. 163.

(*x*) *Holt v. Tyrrell*, 1 Bl. 365; 1 Barnard, 12; 1 Mad. R. 107; Gilb. Ev. 123. *Goodtitle v. Welford*, Doug. 139; 4 Burr. 2254; 1 P. Wms. 287. *Lowe v. Jolliffe*, 1 Bl. 366. An executor is competent to support a will where he takes nothing, nor is interested in the surplus. *Betteson v. Bromley*, 12 East, 250. *Phipps v. Pitcher*, 2 Mars. 20; 6 Taunt. 220. *Lowe v. Jolliffe*, 1 Blk. 365. *Goodtitle d. Fowler v. Welford*, Dougl. 139; 1 Ball & Beatty, 100. 414. An executor of the grantor of a term is a competent witness

Where trustees are empowered as a public body to sue, and are liable to be sued in the name of their treasurer, but are to be deemed the plaintiffs, it seems that they are not competent witnesses for the plaintiff in an action so brought (*y*). Trustee.

Vendor and Vendee.—The vendor of an estate has no interest in the title of the vendee, unless he covenanted for or warranted the title (*z*). Vendor.

Upon the examination of a witness in chief, the principal rule to be observed is, that *leading questions* are not to be asked; that is, questions which suggest to a witness the answer which he is to make. Where a witness is too ready to serve the cause of his party, and willing to adopt and assert what may be suggested for his benefit, objections to questions of this nature are of the highest importance; but where the matter to which the witness is examined is merely introductory of that which is material, it is frequently desirable to lead the mind of the witness directly to the subject; and where the witness is examined as to material facts, it is in general necessary, to some extent, to lead his mind to the subject of inquiry. Questions to which the answer yes or no would be conclusive, would certainly be objectionable; and so would any question which plainly suggested to the witness the answer which the party, or his counsel, hoped to extract (*a*). Where a witness betrays a forwardness to serve the party for whom he is called, but does not know how best to effect his object, it is most essential to justice that he should not be prompted. And it is to be observed, that answers extracted by such improper means are of little advantage in general to the party in whose favour they are given, since evidence obtained from a partial witness by unfair means must necessarily be viewed with the utmost jealousy. Examination in chief.
Leading questions.

On the other hand, objections of this nature ought not to be wantonly or captiously made (*b*), since it is, to some extent, When necessary.

to prove the trust of the term. *Cook v. Fountain*, 3 Swanst. 585; App. So an executor without assets; for although liable to be sued, he is not to pay. *Ib.* The personal representative of a partner is a competent witness against the survivor. *Burton v. Burchell*, 1 Smith, 197.

(*y*) *Whitmore v. Wilkes*, 1 Mood. & M. C. 214; and 3 C. & P. 364.

(*z*) *Busby v. Greenslate*, Str. 445. See tit. VENDOR AND VENDEE.

(*a*) The objection in principle applies to those cases only where the question propounded involves an answer imme-

diately concluding the merits of the case, and indicating to the witness an answer which will best accord with the interests of the party. See 2 Pothier by Evans, 265.

(*b*) *Nicholls v. Dowding*, 1 Starkie's C. 81. In order to prove that Dowding and Kemp were partners, the witness was asked whether Kemp had interfered in the business of Dowding; and upon the objection being taken that this was a leading question, Lord Ellenborough, C. J. held that it was a proper question, and intimated that objections of this nature

When allowed.

always necessary to lead the mind of the witness to the subject of inquiry. In some instances the Court will allow leading questions to be put upon an examination in chief, as where it evidently appears that the witness wishes to conceal the truth, or to favour the opposite party (c). Where an issue has been directed, with

were frequently made without consideration. It is not a very easy thing to lay down any precise general rule as to leading questions: on the one hand, it is clear that the mind of the witness must be brought into contact with the subject of inquiry; and, on the other, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer yes or no would be conclusive. But how far it may be necessary to particularise in framing the question, must depend upon the circumstances of each individual case. Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person: and Lord Ellenborough held that, for this purpose, the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. The same was done in Watson's case, upon a trial at bar, 2 Starkie's C. 128. In these cases, the question was as to a mere fact to be determined by *inspection*; and in all such cases, it seems that the mind of the witness may be led directly to the very point, although a more general question might have been proposed, as, whether the witness saw the person, whom he had described, in court. So where a witness is called to prove the handwriting of another, it is the common practice to show him the document, and to ask, directly, whether that is the handwriting of A. B. But where a witness is examined as to any *conversation, admission, or agreement*, where the particular terms of the admission or contract are important, this objection chiefly becomes material, since there is danger lest the witness should by design or mistake be guilty of some variance, and give a false colouring to the transaction. In such cases there seems to be no objec-

tion to directing the mind of the witness fully to the subject, by asking him whether he was present when any conversation took place between the parties, or relating to the particular subject; and when the mind of the witness has been thus directed to the subject-matter, to request him to state what passed. It is obvious that observations like these are intended for the use of mere students; to such it may not be improper to suggest, that when the time and place of the scene of action have once been fixed, it is generally the easiest course to desire the witness to give his own account of the matter; making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time.

(c) It seems that in each particular case it is in the discretion of the Court to regulate the mode in which a witness in chief shall be examined in order best to answer the purpose of justice, and there is no fixed rule which binds counsel to a particular mode of examining him: if a witness by his conduct shows himself de-

power to examine a party, the counsel of the opposite party may cross-examine him, being a party he is presumed to be an adverse witness (*d*). So where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another as to the contents of a particular letter which is lost, and cannot, without suggestion, recollect the contents, the particular passage may be suggested to him (*e*). So where a witness is called in order to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used, or those things were said, without putting the question in a general form by inquiring what was said. If this were not to be allowed, it is obvious that much irrelevant and even inadmissible matter would frequently be detailed by the witness.

Leading questions, when allowed.

The negative if not allowed to be directly proved, could only be proved indirectly, by calling on the witness to detail the whole of what was said on the particular occasion, if any such were singled out by the evidence, or to detail the whole of several such conversations, where the use of the alleged expressions or words

cidedly adverse, it is in the discretion of the Court to allow cross-examination. The situation of the witness, and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness. A servant will not, in an action against the master, readily admit his own negligence. See 2 Evans's Pothier, 267. If a witness called stands in a situation which of necessity makes him adverse to the party calling him, counsel may as matter of right cross-examine him. Per Best, C. J., *Clarke v. Saffery*, 1 Ry. & M. C 126.

(*d*) *Clarke v. Saffery*, 1 Ry. & M. C. 126. And see *Bastin v. Carew*, 1 Ry. & M. 127. Where the same point was ruled by Abbott, L. C. J., observing, that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice.

(*e*) *Courteen v. Touse*, 1 Camp. 43. The plaintiff's son, in an action on a policy on goods, being asked whether the plaintiff had not written a letter to him saying, "that he had disposed of all his goods at a profit," swore that he did not, but only said that "he might have disposed of the goods at a great profit, as he had been offered 8*d.* a pair," &c. To contradict this a witness was called by the defendant, and after having stated all he recollected about the letter, he was asked if it contained anything about the plaintiff having been offered 8*d.* a pair, &c. Lord Ellenborough held that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained the passage recited; for otherwise it would be impossible to come to a direct contradiction. Where a witness was called to contradict a former witness, as to a conversation which he had denied, it was held that the terms might be suggested to him in the first instance. *Edmonds v. Walker*, cor. Abbott, C. J., Westm. Sitt. after Mich. Term, 1820. 3 Starkie's C. 8.

Leading questions, when allowed.

was not limited to any conversation in particular ; and, after all, the evidence would not be complete and satisfactory to establish the negative, unless sooner or later the question as to the use of the particular expressions were to be directly put, for till then the evidence would show only that the witness did not remember their use ; but the direct negative, after the attention of the witness had been excited by the suggestion of the very expressions, would go much further. It may frequently happen that a witness unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters, sworn to have been made in the course of a conversation. In such cases, therefore, this form of inquiry is absolutely necessary for the obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as for instance, to prove that on some former occasion that witness gave a different account of the transaction, a difficulty may frequently arise in proving affirmatively that the first witness did make such other statement, without a direct question to that effect.

But although the practice above stated is, to a certain extent, sanctioned by a principle of convenience, and although after other attempts have failed, it becomes a matter not of mere convenience but of absolute necessity so to put the question to a witness called to contradict a former one, it is plain that the convenience so attained to is purchased at the expense of some departure from a general principle, and that it would usually be more satisfactory, where that is practicable, that the desired answer should be obtained without a direct suggestion, by which a fraudulent witness might be greatly aided. And it seems that the consideration of mere convenience ought not to operate at all where the contents of a particular document, or the details of a particular conversation, are material to the issue. As where the question in an action of *assumpsit* turns upon the terms of a lost written agreement, or on an alleged oral contract, *e. g.* the warranty of a horse. In such cases each is interested in showing what the terms of the lost writing or conversation alleged to amount to a warranty really were, and as the attention of both parties would be previously drawn to this subject, there would be but little inconvenience in adhering to the ordinary course of examination, reserving the power to deviate where the necessity for deviation arose. And it is further observable that in the case of *Courteen v. Touse* (h), where Lord Ellenborough

(h) 1 Camp. C. 43, *supra*.

ruled that the witness might be asked whether a particular letter contained a passage sworn to by another witness, this was to be done after exhausting the witness's memory as to the contents of the letter. This decision therefore turned not upon a principle of convenience, but of necessity.

Leading questions, when allowed.

Another illustration of the general principle occurs where details are to be made of such length or difficulty that the memory of the witness will not enable him to give his testimony without assistance. Thus where a witness is called to prove a co-partnership between a number of persons whose names he cannot recollect, the list of names may be read to him, and he may be asked whether those persons are members of the firm (*i*).

A witness is examined either as to facts, simply, which he himself knows, or in some instances as to his own inferences from facts, or as to facts which he has heard from others. In ordinary cases the witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from facts, for those are to be formed by a jury, except indeed where the conclusion is an inference of skill and judgment (*k*).

As to what examinable.

A witness examined as to facts ought to state those only of which he has had personal knowledge; and such knowledge is supposed, if not expressly stated upon the examination in chief; and upon cross-examination, his means of knowledge may be fully investigated, and if he has not had sufficient and adequate means of knowledge, his evidence will be struck out. It has been said, that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundum allegata et probata*; and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief (*l*). As far as regards mere belief or persuasion, which does not rest upon a sufficient and legal foundation, this position is *correct*; as where a man believes a fact to be true merely because he has *heard* it said to be so; but with respect to persuasion or belief, as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons, and of handwriting, it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although

Examination of witness as to his actual knowledge.

His belief.

(*i*) *Acerro v. Petroni*, 1 Starkie's C. 100.

(*k*) 4 T. R. 497.

(*l*) *Adams v. Canon*, Dyer, 53; Note to *Rolfe v. Hampden*, 2 Haw. c. 46, s. 167.

His belief. they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury.

With regard to the second objection, it has been decided that a man who falsely swears that he thinks or believes, may be indicted for perjury (*m*). So where professional men and others give evidence on matters of skill and judgment, their evidence frequently does not, and often cannot, from the nature of the case, extend beyond opinion and belief.

The opinion of a witness as to the effect of a clause in a policy is not admissible (*n*); neither, it has been held, is the opinion of a broker, whether particular facts ought to have been disclosed to the underwriter, admissible (*o*).

And where an alleged libel imputed, *inter alia*, that a physician in refusing to act with the plaintiff as a physician, had well and faithfully discharged his duty to his medical brethren, the defendant cannot in support of a plea in justification, examine a medical witness as to his opinion on the subject (*p*).

**Questions
of skill.**

But in general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can the jury be enabled to form a correct conclusion.

The general distinction is this, that the jury must judge of the facts for themselves, but that wherever the question depends on the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness on a fact to the exclusion of the jury, but the establishment of a new fact, relation, or connexion, which would otherwise remain unproved.

Not to admit such evidence, would be to reject what was essential to the investigation of truth.

An engineer may be examined as to his judgment on the effect of an embankment on a harbour, as collected from experiment (*q*).

Upon the question whether a seal has been forged, the testimony of a seal-engraver as to the difference between the impression in question and a genuine one, is also admissible (*r*).

(*m*) *Millar's Case*, 3 Wils. 427; 2 Bl. 881; *Pedley's Case*, Leach, 270.

(*n*) *Syers v. Bridge*, Dougl. 509. But the practice under similar circumstances would be legal evidence. *Ibid*.

(*o*) *Carter v. Boehm*, Burr. 1905. But see Vol. II. 648.

(*p*) *Ramadge v. Ryan*, 9 Bing. 333. *

(*q*) *Folkes v. Chad*, Mich. 23 G. 3, cited

in *Goodtitle v. Graham*, 4 T. R. 498. Vol. II. tit. HANDWRITING.

(*r*) By Lord Mansfield, in *Folkes v. Chad*, cited 4 T. R. 498. Such evidence is also admissible to show whether particular handwriting is natural and genuine, or forged and imitated, *Cary v. Pitt*, Peake's Ev. lxxxv; *R. v. Cohen*, 4 Esp. C. 117. But in *Gurney v. Langlands*, 5 B. & A. 330, the Court held, that the opinion of

A ship-builder may be examined to state his opinion as to the sea-worthiness of a ship, from a survey made by others (*s*).

Questions
of skill.

So the testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established in evidence by others, and without being personally acquainted with the facts (*t*). But in such a case evidence is not admissible that a particular act for which a prisoner is tried was an act of insanity (*u*).

Books of science cannot be received in evidence, yet a witness may be asked as to his judgment, although his means of judging may be derived partly from books (*x*).

In general, scientific men ought to be examined only as to their opinions on the facts proved, and not as to the merits of the case (*y*).

Although a witness cannot be examined as to the contents of a written document not produced, yet he may, in some instances, be examined as to the general result from a great number of documents too voluminous to be read in court (*z*).

General
result.

Although in general leading questions are not to be put to a witness, yet, where his memory has failed, he may, even during examination, read, or, if necessary, hear the contents of a document read, for the purpose of reviving his former recollection. And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence. A witness is of course competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect, and the means of restoration may be the subject of comment in cases to which any suspicion is attached. The law goes further, and in some instances, permits a witness to give evidence as to a fact,

May re-
fresh his
memory.

an inspector of franks, whether a particular writing was in a forged or imitated hand was of little weight. The opinion of a person in the habit of receiving letters is it seems evidence of the genuineness of a post-mark. *Abbey v. Lill*, 5 Bing. 299.

(*s*) *Thornton v. Royal Exchange Assurance Company*, Peake's C. 25. *Charraud v. Angerstein*, Ib. *Beckwith v. Sydebotham*, 1 Camp. 117.

(*t*) *Wright's Case*, Russ. & Ry. C. C. L. 456. *R. v. Searle*, 2 Mood. & M. C. 75.

(*u*) *Ibid*.

(*x*) *Collier v. Simpson*, 5 C. & P. 73; which was an action for imputing want of skill to a medical man.

(*y*) *Jewson v. Drinkald*, 12 Moore, 148.

(*z*) *Meyer's Assignees v. Sefton*, 2 Starkie's C. 276. *Roberts v. Dixon*, Peake's C. 83.

May re-
fresh his
memory.

although he has no present recollection of the fact itself. This happens in the first place where the witness having no longer any recollection of the fact itself, is yet enabled to state that at some former time, and whilst he had a perfect recollection of a fact he committed it to writing. If the witness be correct in that which he positively states from present recollection, viz. that at a prior time he had a perfect recollection, and having that recollection, truly stated it in the document produced, the writing, though its contents are thus but *mediately* proved, must be true. Such evidence, though its reception be warranted by sound principles, is not in ordinary cases (a) as strong and satisfactory as immediate testimony, for in such cases, the witness professing to have no recollection left as to the facts themselves, there is less opportunity for cross-examination, and fraud is more easily practised. There is also a class of cases where the testimony of a witness is admissible to prove a fact, although he has neither any recollection of the fact itself, nor *mediate* knowledge of the fact, by means of a memorial of the truth of which he has a present recollection. This happens where the memorandum is such as to enable the witness to state with certainty that it would not have been made had not the fact in question been true. Here the truth of the evidence does not wholly depend on the contents of the document itself, or on any recollection of the witness of the document itself, or of the circumstances under which it was made, but upon a conviction arising from the knowledge of his own habits and conduct sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative. Thus, in proving the execution of a deed, or other instrument (one of the most ordinary and cogent cases within this class,) where a witness called to prove the execution of a deed sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed (b). The admission of such evidence is not confined to attestations of the execution of written instruments (c). A plaintiff called a bankrupt in an action against his assignees to prove the receipt of

(a) See *R. v. St. Martin's, Leicester*, 2 Ad. & Ell. 210. In many cases, such as where an agent has been employed to make a plan or map, and has lost the items of actual admeasurement, all he can state is, that the plan or map is correct, and has

been constructed from materials which he knew at the time to be true.

(b) Per Bayley J. in *Maugham v. Hubbard*, 8 B. & C. 14.

(c) *Maugham v. Hubbard and others, Assignees of Lancaster*, 8 B. & C. 14.

20*l.* by him from the plaintiff; the witness stated that 20*l.* had been received from the plaintiff, and not carried to account. A rough cash-book of the plaintiff's was then put into the witness's hands, containing the entry, "4th Nov. 1822, Debtor *R. Lancaster*, check 20*l. R. L.*;" the witness then said, "The entry of 20*l.* in the plaintiff's book has my initials, written at the time. I have no recollection that I received the money; I know nothing but by the book, but seeing my initials, I have no doubt that I received the money." An objection made to the reading of the paper without a stamp was overruled, Lord Tenterden being of opinion that though it was not in itself admissible evidence to prove the payment of the money, the witness might use it to refresh his memory, and that his saying he had no doubt that he had received the money, was sufficient evidence of the fact. On a motion for a new trial, Lord Tenterden said, "Here the witness, on seeing the entry signed by himself, said he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory, and when he had said that he had no doubt that he had received the money, there was sufficient parol evidence to prove the payment."

May re-
fresh his
memory.

It is of course essential that the witness should be enabled, upon seeing the memorandum, or other entry, to swear positively to the truth of the fact, although he has no present independent recollection of it (*d*).

It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time (*e*) when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory (*f*), or enables him to swear to the truth of the fact.

(*d*) *R. v. St. Martin's, Leicester*, 2 Ad. & E. 210. *Maugham v. Hubbard*, 8 B. & C. 14.

(*e*) In the case of *Sandwell v. Sandwell*, Comb. 445, Lord Holt is reported to have said, that the memorandum must have been made presently.

(*f*) *Tanner v. Taylor*, 3 T. R. 754; 8 East, 284. *Doe v. Perkins*, 3 T. R. 752. *Sandwell v. Sandwell*, Comb. 445. *Rambert v. Cohen*, 4 Esp. C. 213. *Duchess of Kingston's Case*, 11 Harg. St. Tr. 255.

Hardy v. Lee, 2 Chitt. 124. So a person who has from time to time examined entries in a log-book whilst the events were fresh in his recollection, may refer to the book to refresh his memory when examined as to a fact recorded there, and which he remembers to have seen there when he had a clear recollection of the circumstances. *Burrough v. Martin*, 2 Camp. 112.

A witness is not allowed to refresh his memory by a copy taken from a shop-

May re-
fresh his
memory.

It is not necessary that the paper should have been written by the witness himself, provided that he recollects having seen it when his memory, as to the facts, was still fresh, and that he remembers that he then knew the statement to be correct (*g*).

A deposition formerly made by an aged witness was allowed to be read to him at the trial, in order to refresh his memory (*h*). And where a witness who had received money, and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was read to him in court for a similar purpose (*i*).

And where the plaintiff had entered an account in writing of goods and money from time to time forwarded to the defendant, and the defendant had, by his signature at the foot of each page, admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt-stamps, as the cash items in each page exceeded 40 s., yet it was held that the plaintiff might prove, that upon calling over each article to the defendant, he admitted the receipt, and that the witness who heard him might refresh his memory by referring to the account (*k*).

Whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of particulars entirely forgotten, it must, in conformity with the general principle of evidence, be the *best* for the purpose that the case admits of. For although it be plain that if the recollection of a forgotten fact be completely restored, the means of restoration are immaterial, yet, where the questions are, whether knowledge of the fact once existed, and whether it will be restored by the means proposed, it is obvious that such restoration is more likely to be accomplished by a genuine than by a false, or even imperfect memorandum, and that a false suggestion made by such means is more likely to create an erroneous, than to restore a correct impression. The general principle, therefore, operates to the exclusion of the inferior evidence. Where the object is not to

book, neither of the entries having been written by himself. *Solomons v. Campbell*, cor. Abbott, J. sitt. after Mich. 1822.

(*g*) *Burton v. Plummer*, 2 Ad. & Ell. 341. *Borough v. Martin*, 2 Camp. C. 112. *Jacob v. Lindsey*, 1 East, 460.

(*h*) *Vaughan v. Martin*, 1 Esp. C. 440. See *Doe v. Perkins*, 3 T. R. 749.

(*i*) *Catt v. Howard*, 3 Starkie's C. 3. Where a witness to prove the receipt of

money, after having denied all recollection of it, was shown a written entry with his initials, and then said he had no doubt of his having received the money; held that it was not necessary such paper should be stamped, after being looked at to refresh his memory; the parol evidence to prove the payment was sufficient. *Maugham v. Hubbard*, 8 B. & C. 14; 2 M. & Ry. 5.

(*k*) *Jacob v. Lindsey*, 1 East, 460. *Supra*, tit. STAMP.

restore recollection, but to get at the contents of a writing, on the ground that the witness knows those contents to be true, it is in effect to give the writing in evidence, and consequently to give force to the objection that it is not the best evidence the case admits of. Two steps are essential in such a case to the truth of the conclusion; first, that the witness knows that the fact was truly stated on a former occasion in some particular document; secondly, that the document produced contains that statement; and the best evidence of this is by the production of the original document. In conformity with this principle, it has been held that a mere copy of a writing (*l*), although made by the witness himself, cannot be used for these purposes (*m*).

May refresh his memory.

In analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original has been lost. Yet, in one instance, it was held (*n*) that a copy made by the witness himself six months after the fact, from his own memorandum made at the time of the fact, could not be used, although the witness swore that the original was lost,

(*l*) The rule does not extend to the exclusion of a duplicate original, and in practice a witness is admitted to refresh his memory, as to items of goods delivered, by a copy recently taken by him from a shop-book, or other document of his own writing, or written with his knowledge.

(*m*) In the case of *Burton v. Plummer*, 2 Ad. & Ell. 343, Patterson, J., observed: "The copy of an entry not made by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable whether a paper be produced as evidence in itself, or be used merely to refresh the memory." In the case of *Doe v. Perkins*, 3 T. R. 752, Lord Kenyon cited a case in Chancery, where a motion was made to suppress a deposition on a certificate from the commissioners that the witness refreshed her memory by minutes, consisting of six sheets of paper of her own handwriting, the substance of which she declared she had set down from time to time as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition by

the plaintiff's solicitor, whom she had requested to digest her notes, and reduce them to some order; and that, after he had done so, she transcribed and altered them wherever it was necessary to make them consistent with her meaning, and that the Lord Chancellor, in giving judgment, said: "Should the Court connive at proceedings like these, depositions would really be no better than affidavits, for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memoranda furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition. To be sure, in some cases, a man may use papers at law, but I have known some Judges (and, I think, I adhered chiefly to that rule myself) let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered which had been drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing."

(*n*) *Jones v. Stroud*, 2 C. & P. 196.

May re-
fresh his
memory.

and was at the time of the loss illegible, being covered with figures.

Where a witness refreshes his memory from memorandums, it is usual and reasonable that the adverse counsel should have an opportunity of inspecting them (*o*) for the purpose of cross-examining the witness (*p*); and the witness may be cross-examined as to other parts of the entry (*q*).

Where the memory of a witness has been refreshed previous to the trial, it is not necessary that the writing by means of which this was done should be produced at the trial (*r*), the omission to produce it would of course afford matter for observation. If the document be produced, the opposite counsel is entitled to cross-examine from it (*s*). Where the witness has no distinct recollection of a fact independently of the writing, the writing itself must be produced (*t*).

(*o*) Where a party possessed the means, the recollection of the witness would of course be refreshed before the trial, and then if he testified as to his having an actual present recollection of the fact, it would of course be unnecessary, as regards his testimony in chief, to refer to the means by which his recollection was restored after it had once been lost. Where such means were wanting, or the defect was not anticipated, the attempt may be made, as above stated, at the trial; but as the license might be used for the purpose of putting leading questions or suggestions in the most objectionable form, and facility might, by such means, be given to fraudulent testimony, it is expedient that opportunity should be afforded for the prevention of abuse.

(*p*) Per Eyre, C. J. *Hardy's Case*, 24 Howell's St. Tr. 824. In *R. v. Ramsden*, 2 C. & P. 603, and *Sinclair v. Stevenson*, 1 C. & P. 582, it was held that the opposite counsel had in such a case a right to see the memorandum and examine upon it. See *Howard v. Caulfield*, 5 Dowl. P. C. 417.

(*q*) *Lloyd v. Freshfield*, 2 C. & P. 335.

(*r*) See *Kensington v. Inglis*, 8 East, 273. *Burton v. Plummer*, 2 Ad. & Ell. 341.

(*s*) *Sinclair v. Stevenson*, 1 Carr. & P. C. 582. *R. v. Ramsden*, 2 Carr. & P. C. 603.

(*t*) *Doe v. Perkins*, 3 T. R. 749. The question was, at what time the annual holdings of several tenants expired. Aldridge had gone round with the receiver of the rents to the different tenants, whose declarations as to their times of entry were noted down in a book, some by Aldridge and some by the receiver. Aldridge was examined as to these declarations, the original book not being in court; he admitted that he had no recollection on the subject, except from extracts made by him from the book; and the evidence was afterwards held by the Court of K. B. to have been inadmissible.

In the above case, that of *Tanner v. Taylor* was cited, which had been decided by Legge, B., Hereford Spring Assizes, 1751; where in an action for goods sold and delivered, the witness who proved the delivery took it from an account which he had in his hand; being a copy, as he said, of the day-book which he had left at home: and Mr. Baron Legge held, that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make oath of it; but if he could not from recollection

A witness may also in some instances, on principles which have been already adverted to, be examined as to what he has *heard* from others; and evidence of this nature is either *original evidence*, which is admissible without previous proof to warrant it, or is merely *secondary*, and admissible only in failure of some other and superior evidence, which is no longer attainable. Of the first description is evidence of reputation, and of declarations which accompany and explain material facts and declarations made by the adverse party in the cause (*u*). Hearsay.

Evidence of reputation, subject to the limitations already stated (*x*), is admissible upon questions as to the boundaries of parishes, manors, or other districts in which many persons possess an interest (*y*); upon questions relating to rights of com- Reputation.

swear to the deliveries any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was nonsuited. And see a case cited from Lord Ashburton's notes, 3 T. R. 752. *Rex v. Duchess of Kingston*, 11 St. Tr. 255; 8 East, 284. 289. And see *Kensington v. Inglis*, 8 East, 273. *Hodge's Case*, 28 Howell's St. Tr. 1367. It is not necessary that the witness should have made the entry himself. *Burrough v. Martin*, 2 Camp. 112. *Howard v. Caulfield*, 5 Dowl. P. C. 417.

(*u*) See tit. ADMISSIONS.

(*x*) It will be seen, from what has been already observed on this subject, that the term *reputation*, as denoting a class of evidence, has acquired a technical sense, which differs in some respects from the ordinary sense of the term, and includes all evidence, whether oral or written, which on principles already adverted to is admissible to prove matters of public and general interest.

The cases on this subject will be adverted to under the heads of REPUTATION—PEDIGREE—PRESCRIPTION—HIGHWAY—COMMON—MANOR, and other particular titles to which the decisions relate.

(*y*) See Vol. II. tit. CUSTOM. Hearsay evidence is admissible on a question of pa-

rochial or manorial boundary, although the persons who have been heard to speak of the boundary were parishioners, and claimed rights of common on the very wastes which their declarations have a tendency to enlarge. *Nichols v. Parker*, 14 East, 331.

Where, in trespass for levying a distress for rates claimed to be due on lands in the parish *A.*, the question was whether they were situate in that or the adjoining parish *B.*; it was held, that being a question of boundary, in which reputation was admissible, leases granted by the deceased ancestors of the plaintiff's landlord, describing the land to be situated in *B.*, were properly received in evidence; held, also, that the accounts of deceased overseers of *B.*, to which the tenants of the lands were successively assessed, and against whose names crosses were made, were admissible in evidence of payment of such rates by them, as a common mode of denoting payment. *Plaxton v. Dare*, 10 B. & C. 17. A book of leases of the Dean and Chapter, kept in the chapter-house, is evidence as reputation on a question of boundary. *Coombs v. Wether*, 1 M. & M. 398. Upon the question whether a particular place be parcel of a parish, old entries made by a churchwarden, not charging himself, relating to the repairs of a chapel alleged to belong to the place in question, are not admissible. *Cooke v. Bankes*, 2 C. & P. 478.

mon (z), or other customary rights (a) or obligations, of public high-

(z) See Vol. II. tit. COMMON. A paper signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation, even against other copyholders not claiming under those who signed it. *Chapman v. Coneland*, 13 East, 10. In an action for a trespass on a close, parcel of a common, the defendant justified for a prescriptive right of common at all times over the place in which, &c. and the plaintiff in his replication prescribed to use the place for tillage, &c., qualifying the defendant's general right: held, that reputation was admissible to support such prescriptive right of tillage, which affected a large number of occupiers within the district. *Weeks v. Sparke*, 1 M. & S. 679.

In *Darries v. Lewis*, 2 Chitty's C. 528, hearsay evidence was admitted upon the question whether a particular place was parcel of a sheep-walk. As this, however, was a question of mere private right, the authority of this case seems to be very doubtful. In *Donnison v. Elsely*, 3 Eagle & Y., Title Cases, 1396, the testimony of a witness, derived from hearsay, as to the extent, boundaries, and parcels of an estate, was rejected. And see *Clothier v. Chapman*, 14 East, 331, n. Where it was held that such evidence was not admissible to prove the boundary of a private estate. Orders of justices at sessions are evidence to prove a district to be parcel of a hundred, they being residents. *Newcastle, Duke of, v. Broxtowe Hundred*, 4 B. & Ad. 273. See, further, *Barnes v. Mawson*, 1 M. & S. 81. *Steele v. Prickett*, 2 Starkie's C. 466, and Appendix.

(a) Reputation is evidence on questions respecting general customs concerning parishes or manors, or the inhabitants of towns and other places. *Morewood v. Wood*, 14 East, 327, n.

Where it is contended that, by the custom of a manor, land shall descend to the eldest female heir, general reputation of such custom, and instances of its having so descended on some occasions, is evidence proper to be left to a jury, though the descent contended for in the particular

instance is not exactly similar to any of those that are adduced in evidence; as where the estate is claimed by the grandson of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters. *Doe, ex dem. Foster v. Sisson*, 12 East, 62.

In a suit between a copyholder and his lord, the copyholder rested his case upon an immemorial custom of the manor, the existence of which the lord denied. At the trial the lord produced the record of a suit by bill in the Exchequer, 4 W. & M., wherein the parties litigant were described as lord and copyholder (of the same manor), and the parties deposing for the copyholder were so described, that if the description were true, they were legally competent to give evidence touching the customs of the manor. Their depositions went to prove a custom inconsistent with that relied upon by the now plaintiff; and to disprove the existence of such last-mentioned custom, the lord offered them as evidence. It was objected: 1. That the present parties were not privies to the record of the former suit, and therefore could not be affected by any matter therein contained; it was *res inter aliu acta*. 2. Or supposing that the depositions were admissible as evidence of reputation, still that it must be shown that the parties were invested with the characters described in the depositions, and not having which, they were incompetent to depose. 3. Or even waiving the two former objections, that the depositions were inadmissible in evidence, being declarations made *post litem motam*. The objections were overruled, because: 1. The depositions were not offered as a record estopping the plaintiff, but as declarations of deceased persons, touching a reputation or received opinion: their simple assertions would have been evidence; *a fortiori* those made under the sanction of an oath. 2. That at the distance of time, the fact that the witnesses were clothed with the character in which they deposed must be taken for granted; else it would be requiring a proof which, in all probability, it were impossible to adduce. 3. The two customs,

ways(b) on question of pedigree(c), questions as to rights of toll(d), and some other questions of public and general interest(e). Reception of evidence.

It is not essential to the reception of such evidence, where it is adduced in proof of a right, that a foundation should previously have been laid by evidence of enjoyment, but without such proof, evidence of this kind is of little weight(f). It is usually essential to the reception of evidence of any declaration or entry falling within this description, that it should have been made *ante litem motam* (g).

—the one litigated in the former, the other in the present suit,—are different; the declarations, therefore, though made after the first custom was questioned, were made before the controversy touching the present was raised. *Freeman v. Phillips*, 4 M. & S. 486.

Upon a question as to the custom of tithing in the parish of A., evidence that such a custom exists in the adjacent parishes is not admissible. *Secus*, if the custom be laid as the general custom of the whole country. *Furneaux v. Hutchins*, Cowp. 807.

Where a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence. *Furneaux v. Hutchins*, Cowp. 807; Dougl. 512. *Doe, d. Foster v. Sisson*, 12 East, 63. Such evidence is admissible to prove a custom of a corporation to exclude foreigners from trading there. *Davis v. Morgan*, 1 Cr. & J. 593.

(b) See tit. HIGHWAY. *Reed v. Jackson*, 1 East, 356. Such evidence is admissible upon an indictment for not repairing a public bridge, to show that it is a public bridge. *R. v. Sutton*, 8 A. & El. 516; although, in one case, this seems to have been doubted. *R. v. Antrobus*, 2 Ad. & Ell. 794.

In *White v. Lisle*, 4 Madd. 214, the Vice-Chancellor observed, that in late times evidence of reputation had not been tendered in cases of reputation as to individual rights, except as to rights of way.

(c) See PEDIGREE.

(d) A deed under the seal of the University of Cambridge, between them and the town of Cambridge, relating to the tolls

in question, held admissible as evidence of reputation respecting them. *Brett v. Beales*, 1 M. & M. 417. See vol. II. tit. PRESCRIPTION.

(e) Such evidence has been received concerning the jurisdiction of a court upon a question whether it was or was not a court of record. *Rogers v. Wood*, 2 B. & Ad. 245. *Braine v. Dew*, 2 Peake's C. 204. But in *R. v. Antrobus*, 2 Ad. & Ell. 794, on the trial of an information against the sheriff of a county for not executing a convict under sentence of death, it was held that a witness could not be examined as to his having heard that it was the custom for the sheriff to be exempted from performing, and for another to perform the duty in that county, although proof had been given that another had always performed it within the time of living memory, because, as was said, the public were not interested in the question which officer was to perform the duty. Lord Holt, in *Harcourt's Case*, Comb. 902, admitted evidence of reputation to prove in an action of *ejectione firmæ* for a rectory, that the plaintiff was in holy orders, proof having been previously given of presentation, admission, and institution, and of the reading of the articles. Such a fact seems, however, to be more properly the subject of presumption than of proof by reputation. See *The Bishop of Meath v. Lord Belfield*, B. N. P. 295. Evidence of reputation that the land in question had belonged to a particular individual, and been purchased of him by an alleged testator, has been held to be clearly inadmissible. *Doe v. Thomas*, 14 East, 323.

(f) *Barrett v. Crease*,

(g) But although this be generally

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hearsay.

In other cases a witness may be examined as to matter of hearsay, where the evidence is admissible as secondary evidence (*l*). Such evidence is in some instances admissible to prove the testimony given by a witness in a former suit between the same parties, who is since deceased (*m*); but in this, as well as in all other cases where such secondary testimony is admitted, it is necessary to lay the foundation, by previous proof, that the superior evidence, in place of which the secondary evidence is offered, is no longer attainable. In order to warrant the reception of evidence of what a deceased witness swore on a former trial between the same parties, it is necessary to prove, not only the death of that witness, but also that the testimony was given in a cause legally depending between the same parties (*n*). After such evidence has been given, parol evidence of what the deceased witness swore upon the former trial is admissible (*o*).

Previous also to the admission of evidence of traditional declarations which the witness has heard made by others, it is necessary to prove the deaths of the parties who made them. And where the declarations of deceased persons are admissible on special grounds, the circumstances which warrant the reception of the evidence require collateral proof (*p*).

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confidence.

It has already been seen that the law, upon grounds of policy (*q*),

true as to mere traditional declarations, the rule is not, and indeed cannot be applicable to verdicts and judgments which fall within the general description of evidence by reputation. See *Reed v. Jackson*, 1 East, 356. Cases of this description stand, in fact, upon a foundation somewhat different from ordinary declarations or entries by private persons. On this subject some observations will afterwards be made.

(*l*) *Supra*, 43.

(*m*) *Lord Palmerston's Case*, cited 4 T. R. 290. *Mayor of Doncaster v. Day*, 3 Taunt. 262.

(*n*) See below, tit. JUDICIAL PROCEEDINGS.—DEPOSITION.

(*o*) Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn held admissible, notwithstanding an order for reading the depositions of such witnesses as had died since the first trial. *Tod v. Winchelsea, Earl of*, 3 C. & P. 387.

(*p*) For instances where such evidence is admissible, and the nature of the proof previously requisite to warrant its admission, see below, tit. ENTRIES BY THIRD PERSONS.

(*q*) Where a commander-in-chief directed the defendant (a major-general), with six other officers, to inquire into the conduct of the plaintiff, and to report the opinion of those officers, which was done accordingly, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read (*Home v. Bentinck* 2 B. & B. 130). So official communications between the governor and law-officer of a colony as to the state of the colony (*Wyatt v. Gore*, Holt's C. 299), or between an agent of government and a secretary of state (*Anderson v. Sir W. Hamilton*, 2 B. & B. 156), are privileged.

in some instances precludes a witness from revealing matters of political or professional confidence. And therefore, although upon a trial for high treason, it was held that a witness who had made communications in order to their transmission to the Government, might be properly asked whether he had made such communication to any magistrate, and that he could be further asked to whom he made such communication (*r*); and a majority of the Judges (*s*) were of opinion that on the witness having admitted that he had communicated what he knew to a friend, which friend had advised him to make the same communication to another; and having stated that such friend was not a magistrate, he could not be asked who that friend was, on the ground that the person by whose advice the information was given to a person standing in the situation of a magistrate, was in effect the informer. So a witness who has been employed by an officer to collect evidence as to the proceedings of suspected persons, is not allowed to disclose the name of his employer, or the nature of the connexion that subsisted between them (*t*).

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In some other instances also, witnesses, on grounds of general policy, are not allowed to be examined.

A member of parliament cannot be cross-examined as to what has passed in parliament (*u*). And upon the same principle it would no doubt be held that a privy councillor could not be examined as to disclosures made before the King in council (*x*).

Lord Kenyon is in one instance reported to have held that it was competent to the plaintiff's counsel, in an action for a malicious prosecution, to inquire of a grand juror whether the defendant was prosecutor of an indictment (*y*), being of opinion that an answer to such an inquiry would not infringe upon the witness's official oath (*z*); but doubts have since been entertained by a high authority as to the propriety of admitting such evidence (*a*).

(*r*) *Hardy's Case*, 24 Howell's St. Tr. 808.

(*s*) The Lord Chief Baron Macdonald and Buller, J., were of opinion that the question was proper: Lord C. J. Eyre, Mr. Baron Hotham, and Mr. J. Grose, were of a different opinion.

(*t*) *R. v. Hardy*, 24 Howell's St. Tr. 753.

(*u*) Evidence was permitted to be given by a privy councillor against Lord Strafford, of confidential advice given by the latter to the King at the council-table; 4 Inst. 54: a proceeding justly reprobated by Lord Clarendon.

(*x*) *Plunkett v. Cobbett*, 29 Howell's St. Tr. 71. The action was for a libel; and on the defendant's inquiring on cross-examination as to expressions used by the plaintiff in parliament, Lord Ellenborough observed that it would be a breach of duty in the witness, as a member of the (Irish) parliament, and a breach of his oath, to reveal the councils of the nation.

(*y*) *Sykes v. Dunbar*, 2 Sel. N. P.

(*z*) "The King's counsel, your own, and your fellows', you shall keep secret."

(*a*) Lord Ellenborough, in *Watson's Case*, 24 Howell's St. Tr. 107, said that he

Matter of confidence.

So it has been seen that the law, on grounds of extrinsic policy, prohibits the disclosure of confidential communications between a counsel or an attorney and his client (*b*); and also usually prohibits a husband or wife from giving testimony prejudicial to the other (*c*).

Cross-examination.

When the witness has been examined in chief, the adverse party is at liberty to cross-examine him. The power and opportunity to cross-examine, it will be recollected, is one of the principal tests which the law has devised for the ascertainment of truth, and this is certainly a most efficacious test. By this means the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanor of the witness; circumstances which are often of as high importance as the answers themselves (*d*). It is not easy for a witness who is subjected to this test, to impose upon the Court; for however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause.

Witness called, but not examined in chief.

A witness when once called, sworn and examined, although merely as to the formal proof of a document, may be cross-

had doubts upon the point, and that many very eminent men at the bar had entertained doubts upon it.

(*b*) *Supra*, and see Vol. II. tit. CONFIDENTIAL COMMUNICATIONS. In the case of *Curry v. Walter*, 1 Esp. C. 456, Eyre, C. J., held that it is at the option of a barrister, whether he will give evidence of what

he stated to the Court upon making a motion. *Qu.*

(*c*) *Supra*, and see Vol. II. tit. HUSBAND AND WIFE.

(*d*) Bac. Ab. Ev. E. Hob. 325; Hale, P. C. 253. 259; Pref. to Fortes. Rep. 2 to 4; Vaugh. Rep. 143.

examined, although he be the real party in the cause (*e*). And it has been held, that if a witness has once been called into the box and sworn, he may be cross-examined by the opposite side, although he has not been examined in chief (*f*). But it has since been ruled that where a witness, though sworn, is merely called to produce a writing in his possession, and no question is asked, the adverse party is not entitled to cross-examine (*g*). And where, in an action by the assignees of a bankrupt, the petitioning creditor was called, for the purpose of producing the bill of exchange on which the debt was founded, the Court would not permit him to be cross-examined by the defendant, since he could not have been examined by the plaintiffs (*h*). If the witness be sworn, and would be a competent witness for the party calling him, the adversary will be entitled to cross-examine him, although he has not been examined in chief (*i*), unless he was sworn by mistake (*k*).

Witness called, but not examined in chief.

It has been said, that where a witness has been examined by one party, he may afterwards be cross-examined as an adverse witness, when he is called by the adversary as one of his own witnesses (*l*). Yet if a party omit, from prudential motives, to examine his adversary's witness as to any branch of his own case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered to all purposes, and why the adversary should not then be entitled to cross-examine him. The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff, and the other for the defendant; and if each party call him as his own witness, there seems to be no reason why each should not be in turn bound by the same principle; why each, in examining into his own case, should not be precluded from putting leading questions, and be entitled to cross-examine as to his adversary's case.

Practice as to cross-examination.

(*e*) *Morgan v. Brydges*, 2 Starkie's C. 314. So in a criminal case. *R. v. Brooke*, 2 Starkie's C. 473.

(*f*) *Phillips v. Eamer*, 1 Esp. C. 357; *R. v. Brooke*, 2 Starkie's C. 473.

(*g*) *Simpson v. Smith*, cor. Holroyd, J., Nottingham Summer Ass. 1822. In an action for a malicious prosecution, the magistrate who committed the plaintiff was called to produce the information, but was asked no question, and the learned Judge held that the defendant's counsel were not entitled to cross-examine him.

Davis v. Dale, 1 Mood. & M. 514; 4 C. & P. 335. So in criminal cases. *R. v. Murlis*, ib. n. See also *Stummers v. Moseley*, 2 Cr. & M. 477. *Rush v. Smith*, 1 Cr. M. & R. 94. *Perry v. Gibson*, 1 Ad. & E. 48.

(*h*) *Read v. James*, 1 Starkie's C. 132.

(*i*) *Phillips v. Eamer*, 1 Esp. C. 357. *R. v. Brooke*, 2 Starkie's C. 473.

(*k*) 3 Carr. & P. C. 16. *Rush v. Smith*, 1 Cr. M. & R. 94.

(*l*) *Dickinson v. Shee*, 4 Esp. C. 67.

The mode of examination is, in truth, regulated by the discretion of the Court, according to the disposition and temper of the witnesses; the Court frequently permits an adverse witness to be cross-examined by the party who calls him.

Leading questions.

The Courts do not usually exclude a party on cross-examination of a witness, from putting leading questions, although the witness betray an anxiety to serve that party; it is however obvious that evidence so obtained is very unsatisfactory, and is open to much observation (*m*).

Although upon cross-examination a counsel may put leading questions, those questions must not assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact (*n*). The witness cannot be cross-examined as to the contents of a written document which is not produced (*o*); nor as to the contents of a written document which is in the hands of the adversary, and which he has had notice to produce; for this is part of the case of the party who cross-examines, which cannot be gone into until that of his adversary has been concluded.

Witnesses may be examined apart from each other.

For the purpose of furthering the object of cross-examination, the Court will, in general, at the instance of either party (*p*), direct that the witnesses shall be examined each separately, apart from the hearing of the rest (*q*); a strong test to try the consistency of

(*m*) I have heard *Ld. Tenterden, C. J.*, express himself to that effect more than once. In *Hardy's Case*, 24 Howell's St. Tr. 755, upon a trial for high treason, a witness having been called for the prosecution who was favourable to the prisoner, and who had been a member of the Corresponding Society, was asked whether particular expressions, which were suggested to him, had not been used by the members of that society; and *L. C. Justice Eyre* informed the counsel that he could not put words into the mouth of the witness, and that this was contrary to the practice of the court, and to his opinion. And *Buller, J.*, upon the same trial, said, "You may lead a witness, upon cross-examination, to bring him directly to the point as to the answer; but not go the length, as was attempted yesterday, of putting into the witness's mouth the very words which he is to echo back again."

In the late case of *Parkin v. Moore*,

7 C. & P. 408, *Alderson, B.*, said: "I apprehend you may put a leading question to an unwilling witness on the examination in chief, but you may always put a leading question in cross-examination whether a witness be willing or not."

(*n*) *Hill v. Coombe*, cor. *Abbott, J.* Exeter Spring Assizes 1818; *Handley v. Ward*, cor. *Abbott, L. C. J.*, Lancaster Spring Assizes 1818.

(*o*) *Sainthill v. Bound*, 4 Esp. C. 74.

(*p*) The Court will order the witnesses on the part of the defendant out of court, even after the plaintiff's case is closed. *Taylor v. Lawson*, 3 C. & P. 543.

(*q*) *Attorney-General v. Bulpit*, 9 Price, 4. This is a general rule by the law of Scotland in all criminal prosecutions. *Hume's Comm. on Crim. Law of Scotland*, vol. 2, 365; *Burnet's Treatise*, 467; *Phillips on Ev.* vol. 1, 258. The same rule prevails in the Exchequer in revenue cases, as to witnesses for the defendant.

their account (*r*); and the same indulgence may be granted to a prisoner, but not as a matter of right (*s*). Witnesses may be examined apart.

It has been held, that an order of exclusion does not extend to an attorney in the cause (*t*).

Where a witness remains in court after an order for their exclusion, the rejection or admission of his testimony is a question for the discretion of the Judge under all the circumstances of the case (*u*); but in the Court of Exchequer the rule for the rejection of such witnesses, in revenue cases, is known, and inflexible (*x*).

Where the witness remained from mistake, and from no undue motive, his testimony was received (*y*).

Where, after witnesses had been ordered out of court, one had returned, and heard another give his evidence, the Judge allowed him to be examined as to facts not sworn to by any previous witness, but with liberty to move to enter a nonsuit (*z*).

It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him; for this would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues. In the case of *Spencely v. Willot* (*a*), which was a penal action for usury, the defendant's counsel were not permitted to cross-examine as to other contracts made on the same days with other persons, in order to show that the contracts in question were of the same Cross-examination as to collateral facts.

(*r*) No falsehoods are so difficult to be detected as those which are mixed up with a great portion of truth; the greater the proportion of true facts is which are combined with the false ones, the less opportunity will there be to detect the false by comparison with facts ascertained to be true. An ingenious mode of proving an *alibi* with consistency has long been known and practised by roguish adepts. The intended witnesses meet and pass the afternoon or evening together in convivial entertainment: when they are afterwards examined, they are all consistent as to the circumstances which attended their meeting, for so far they relate nothing more than the truth; they misrepresent nothing but the time when the transaction took place, which, for the purpose of the *alibi*, is of course represented to be that of the robbery.

(*s*) 4 St. Tr. 9.

(*t*) *Pomeroy v. Baddeley*, 1 Ry. & M. C. 430; *Everett v. Lowdham*, 5 C. & P. 91. *R. v. Webb*, Sarum Summer Ass. 1819, cor. Best, J. contra.

(*u*) A new trial in one case was granted because a witness's testimony had been rejected on that ground. Per Alderson, B. in *Cooke v. Nethercote*, 6 C. & P. 741; and the case reported in the note. See also 4 C. & P. 585. *Thomas v. David*, 7 C. & P. 350. *R. v. Colly, Mood. & M.* 329.

(*x*) *Parker v. M'William*, 6 Bing. 683.

(*y*) *R. v. Cully*, 1 Mood. & M. C. 329.

(*z*) *Beunton v. Ellice*, 4 C. & P. 585.

(*a*) 7 East, 108. See Mr. J. Holroyd's observations on the case, 2 Starkie's C. 156. *Harris v. Tippet*, 2 Camp. 638.

Cross-examination as to collateral facts.

nature, and not usurious, if the witness answered one way, or to contradict him if he answered the other way. And should such questions be answered, evidence cannot afterwards be adduced for the purpose of contradiction (*b*). The same rule obtains, if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony; his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it (*c*). This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry. A witness may be asked whether, in consequence of his having been charged with robbing the prisoner, he has not said that he would be revenged upon him; and in case of denial, he may be contradicted (*d*). In such a case the inquiry is not collateral, but most important, in order to show the motives and temper of the witness in the particular transaction.

How far the witness is bound to answer.

It is now settled by the authority of the Legislature (*e*), that a witness cannot refuse to answer questions because he may subject

(*b*) *Harris v. Tippet*, 2 Camp. 638.
R. v. Watson, 2 Starkie's C. 149.

(*c*) *R. v. Watson*, 2 Starkie's C. 149. *R. v. Teale and Others*, cor. Lawrence, J., at York. It is said to have been held, that the question, whether a witness for one party had not attempted to deprive a witness for the adversary from attending to give evidence at the trial, was so immaterial, that if the witness answered in the negative, he could not be contradicted. *Harris v. Tippet*, 2 Camp. 637, cor. Lawrence, J. It cannot however be doubted, that the fact, if proved, would show a very strong and improper bias on the mind of the witness, and in a doubtful case afford a fair ground for suspecting his sincerity. In *Ld. Stafford's Case*, 7 Howell's St. Tr. 1400, the prisoner was allowed to prove that Dugdale, a witness for the prosecution, had endeavoured to suborn witnesses to give false evidence against the prisoner.

The late case of *Thomas v. David*, 7 C. & P. 350, tends to overrule *Harris v. Tippet*. In an action on a promissory note, a servant of the plaintiff's (an attesting witness) called to prove the signature, was asked, on cross-examination, whether she did not sleep in the same bed with the plaintiff. On its being objected that the point of intended contradiction was merely

collateral, Coleridge, J., overruling the objection, said: "Is it not material to the issue whether the principal witness who comes to support the plaintiff's case was his kept mistress? If the question had been whether the witness had walked the streets as a common prostitute, I think that would have been collateral to the issue, and that if the witness had denied such a charge, she could not have been contradicted; but here the question is, whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to support a forgery—just in the same way as if she had been asked if she was the sister or daughter of the plaintiff." Where the question was, what consideration passed on discounting a bill of exchange, Lord Tenterden held, that what a witness had said upon a former trial between the parties concerning another bill discounted at the same time and under the same circumstances was not collateral. 3 C. & P. 76. In an action on a policy of insurance, a witness for the defendant was asked, whether he had not said that "they had not a leg to stand upon." Tindal, L. C. J., held, that contradiction was inadmissible. *Elton v. Larkins*, 5 C. & P. 590.

(*d*) *Yewin's Case*, 2 Camp. 638, n.; cor. Lawrence, J.

(*e*) The statute 46 G. 3, c. 37, declares

himself to a civil liability or charge; but he is not bound to answer any question, either in a court of law or of equity, if his answer will expose him to any criminal punishment or penal liability, agreeably to the wise and humane principle that no man is bound to criminate himself (*f*). Accordingly, a witness is not compellable to say whether he published a particular paper, if the contents be libellous (*g*). Upon an appeal against an order of bastardy, he is not bound to declare whether he is the father of a bastard child (*h*). In an action against the acceptor of a bill of exchange a witness is not bound to answer whether the bill was not given for differences on stock-jobbing transactions for time (*i*).

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answer.

and enacts, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no *tendency* to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons.

Before the passing the above Act it was *rezata questio*, whether a witness was bound to answer when the answer might subject him to civil liabilities. On the question being proposed by the House of Lords to the Judges, Mansfield, C. J. of C. P., Grose and Rooke, Js., and Thompson, B., were of opinion that he was not; but the Lord Chancellor and the other Judges were of a contrary opinion. They were all of opinion that a promise to a witness that he should be excused from certain debts, provided he made a full and fair disclosure, did not render him incompetent on the score of interest. Cobbett's P. D. vol. 6, p. 167.

A rated parishioner in a settlement case is a party to the appeal, and therefore does not come within the words or meaning of the Act. *R. v. Woburn*, 10 East, 395. See 54 G. 3, c. 170.

(*f*) *R. v. Barber*, Str. 444; *Cates v. Hardacre*, 3 Taunt. 424; *Sir J. Friend's Case*, 4 St. Tr. 6; *Lord Macclesfield's Case*, 6 St. Tr. 649; 16 Ves. jun. 422; *Title v. Grevet*, 2 Lord Raym. 1088. *R. v. Oates*, 4 St. Tr. 9, 10; 2 Haw. c. 46;

Mitford's Ch. Pl. 157. *R. v. Lord George Gordon*, 2 Doug. 593. *Hardy's Case*, 24 Howell's St. Tr. 755. *Parkhurst v. Lowten*, 2 Swans. 216. But it seems that a stock-broker, who, under the st. 7 G. 2, c. 8, s. 29, is required under a penalty to keep a book, would be bound to produce it.

A banker is not privileged from stating the amount of his customer's balances. *Lloyd v. Freshfield*, 2 C. & P. C. 329.

Where a witness declined on cross-examination stating where he lived, as he believed that a bailable writ was out against him at the suit of the defendant, the Court would not compel him to answer. *Watson v. Bevern*, 1 Carr. C. 363.

(*g*) *R. v. Barber*, Str. 444; *Maloney v. Bartley*, 3 Camp. C. 210, where, in an action for a libel published in an affidavit sworn before a magistrate, it was held that the magistrate's clerk was not bound to state whether he wrote the affidavit and delivered it to the magistrate: a bill of exceptions was tendered, but not proceeded in. In an action for a libel on the plaintiff as hundred constable, purporting to be a memorial from the vestry of *P.*, the vestry-clerk being called to produce the vestry-books, it was held, that he could not refuse on the ground that he might thereby criminate himself. *Bradshaw v. Murphy*, 7 C. & P. 612.

(*h*) *R. v. St. Mary's, Nottingham*, 13 East, 58, n.

(*i*) *Thomas v. Tucker*, cor. Ld. Tenterden, C. J., sitt. after Easter, 1827.

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The prosecutrix on an indictment for a rape is not bound to answer whether she has had criminal intercourse with any other person (*k*). An accomplice, admitted to give evidence for the Crown, is not bound to disclose his share in other offences which are not the subject of inquiry, and for which he would be liable to prosecution (*l*). A witness is also protected from answering any question which would subject him to any penalty, or to forfeiture of his estate (*m*). And it has even been held, that a witness is protected from admitting his commission of an offence, although he has received a pardon (*n*). But where a witness has been guilty of an infamous crime, and has been punished for it, he may, it is said, be asked whether he has not undergone the punishment, because his answer cannot subject him to further punishment (*o*). And where the questions might subject the witness to penalties, but the time for proceeding against him is passed, he is bound to answer (*p*). If the witness answer questions improperly put, his answers may afterwards be used as evidence against him (*q*). Where a witness, after having been cautioned that he is not compelled to answer a question on the ground that his answers might subject him to an indictment, yet if he answers at all, is bound to disclose the whole of the transaction (*r*).

Cross-examination in order to discredit a witness.

The protection has been carried much further. It has been held, that a witness is not bound to answer any question which tends to render him infamous, or even to disgrace him. Upon an indictment for rape, it is said to have been held by a majority of the Judges, that the prosecutrix was not bound to say whether she had not had a criminal connexion with other men (*t*), and that

(*k*) *R. v. Hodgson*, 1 Russ. & Ry. C.C. 211; and see *Dodd v. Norris*, 3 Camp. C. 519.

(*l*) *West's Case*, O. B. Sess. after Easter T. 1823.

(*m*) The declaratory statute 46 G. 3. c. 37, imports that a witness is not bound to answer any question the answering of which tends to expose him to a penalty or forfeiture of any nature whatsoever. So in equity a party is not bound to answer so as to subject himself to any punishment, pains, penalties, or forfeiture of interest. See Mitford's Treatise on Chancery Pleadings, 157.

(*n*) *R. v. Reading*, 2 St. Tr. 822; *R. v. Earl of Shaftsbury*, 3 St. Tr. 439. In

such case the answer may place him in jeopardy, and he would have to set up the pardon in bar to the prosecution.

(*o*) *R. v. Edwards*, 4 T. R. 440, where a bail was asked whether he had not stood in the pillory for perjury. But see below.

(*p*) *Roberts v. Allatt*, 1 Mood. & M. C. 192.

(*q*) *Stockfleth v. De Tastet*, 4 Camp. 10; *Smith v. Beadrall*, 1 Camp. 30. *R. v. Mercer*, 2 Starkie's C. 366.

(*r*) *Dixon v. Vale*, 1 Carr. C. 278. *East v. Chapman*, 2 C. & P. 570. So in the case of a witness interrogated in equity. *Austin v. Poiner*, 1 Sim. 348.

(*t*) *R. v. Hodgson*, York Summer Ass. 1810, cor. Wood, B., M.S. The answer

such evidence was inadmissible. In *Cooke's Case* (u), Treby, C. J., said, "if it be an infamous thing, that is enough to preserve a man from being bound to answer;" and he therefore held, that persons convicted and pardoned, or convicted and punished for crimes, could not be obliged to answer, since it was matter of reproach; and that it should not be put upon a man to answer a question wherein he would be forced to forswear or disgrace himself (x). It is, however, to be observed, that the case of *The King v. Edwards* (y) is inconsistent with the above dictum; since it was there held that a witness might be asked whether he had stood in the pillory for perjury.

Cross-examination in order to discredit a witness.

The question, whether a witness may be asked questions which tend to disgrace him (z), is, like many other difficult questions on the subject of evidence, one of policy and convenience. On the one hand, it is highly desirable that the jury should thoroughly understand the character of the persons on whose credit they are to decide upon the property and lives of others; and neither life nor property ought to be placed in competition with a doubtful and contingent injury to the feelings of individual witnesses. On the other hand, it may be said that it is hard that a witness should be obliged upon oath to accuse himself of a crime, or even to disgrace himself in the eyes of the public; that it is a harsh alternative to compel a man to destroy his own character, or to commit perjury; that it is impolitic to expose a witness to so great a temptation; and that it must operate as a great discouragement to witnesses, to oblige them to give an account of the most secret transactions of their lives before a public tribunal. That a collateral fact tending merely to disgrace the witness, is not one which is properly relevant to the issue, since it could not be proved by any other witness; and that there would be, perhaps, some inconsistency in protecting a witness against any question, the answer to which would subject him to a pecuniary penalty, and yet to leave his character exposed. In the first place, it seems to be quite settled that a man is not bound to criminate himself, or to

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here, however, might have subjected the witness to spiritual censure and punishment.

(u) 4 St. Tr. 748. 1 Salk. 153.

(x) The question in that case was, whether a juryman who had been challenged could be asked whether he had not before the trial asserted the guilt of the prisoner.

(y) 4 T. R. 440. See *Rex v. Lewis and*

Others, 4 Esp. C. 225; where it is said to have been ruled, that a witness could not be asked whether he had been in the House of Correction; and *Macbride v. Macbride*, 4 Esp. 242, where it was held that a witness could not be asked questions which tended directly to disgrace him.

(z) See tit. RAPE—SEDUCTION.

Whether bound to answer questions tending to his disgrace.

answer any question which may incur a penalty (a). It may be observed further, that the principle extends not only to questions where the answer would immediately criminate the witness, but to all questions which tend collaterally to his conviction (b), or to supply any link in proof of a charge against him. As to questions which tend *merely* to disgrace the witness, there is some difficulty.

In *Cooke's Case* (c), the prisoner, on an indictment for high treason, asked the jurors, in order to challenge them, whether they had not said that he was guilty, and would be hanged? and the question was overruled; and the Court said, you shall not ask a witness or juryman whether he hath been whipped for larceny, or convicted of felony; or whether he was ever committed to Bridewell for a pilferer, or to Newgate for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that of himself which tends to shame, crime, infamy or misdemeanor. In this case it is to be recollected that the object was to exclude the juryman entirely by raising an objection to his competency. The same observation applies also to *Layer's Case* (d), where the Court overruled the attempt of the prisoner to ask a witness, on the *voire dire*, whether he had been promised a pardon, or some reward, for swearing against the prisoner; and in that case L. C. J. Pratt said, if the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise. In *Sir J. Friend's Case* (e) it was ruled, that the witness could not be asked whether he was a Roman-catholic, since he might thereby subject himself to penalties. The question, whether a witness was bound to answer a question upon a collateral fact tending to disgrace him, did not

(a) *Supra*; and see *R. v. De Berenger and Others*, reported by Gurney, 195; *Parkhurst v. Lomton*, 2 Swanst. 216; *Title v. Crevet*, 2 Ld. Ray. 1088. *Cates v. Hardacre*, 3 Taunt. 424; 16 Ves. 242; *Hardy's Case*, 24 Howell's St. Tr. 720. In some instances it has been found necessary to protect witnesses from penalties to which their evidence has rendered them liable, by an Act of Parliament. See 45 G. 3, c. 126; 1 & 2 G. 4, c. 21.

(b) *Cates v. Hardacre*, 3 Taunt. 424. *Macullum v. Turton*, 2 Y. & J. 183. In strictness, however, it is no ground of legal objection by the party in the cause, that the answer to a proposed question

may place the witness in jeopardy; it is peculiarly the objection of the witness himself, who is under the protection of the law, and is always apprised of his situation by the presiding Judge.

(c) 1 Salk. 153; 4 St. Tr. 748; and see the observations of Treby, J. above.

(d) 6 St. Tr. 259. The Chief J. (Pratt), did not deny that the question might be put after the witness had been sworn. The cases of a witness and juror differ very materially: with respect to jurors, no question is properly allowable, except for the purpose of showing total incompetency.

(e) 4 St. Tr. 259.

arise in any of the foregoing cases (*f*), and therefore the *dicta* thrown out by the Court were, in some measure, extra-judicial, as far as regards the present question. In the case of *R. v. Lewis* (*g*), which was an indictment for an assault, a witness, who is stated in the report of the case to have been a common informer, and a man of suspicious character, was asked, upon cross-examination, if he had not been in the house of correction in Sussex? And Lord Ellenborough is stated to have interposed, and to have said, that the question should not be asked, since it had formerly been settled by the Judges, among whom were C. J. Treby and Mr. J. Powell, both very great lawyers, that a witness was not bound to answer any question the object of which was to degrade or render him infamous. It is to be observed, however, that his Lordship did not afterwards strictly adhere to this rule (*h*). In the case of *Macbride v. Macbride* (*i*), a witness for the plaintiff, in an action of assumpsit, was questioned as to her cohabiting with the plaintiff; Lord Alvanley interposed, and excluded the question; but his Lordship added, "I do not go so far as others may; I will not say that a witness shall not be asked to what may tend to disparage him; that would prevent an investigation into the character of the witness, which it may be of importance to ascertain. I think those questions only should not be asked which have have a direct and immediate effect to disparage." In the case of *Harris v. Tippet* (*j*), the witness was asked in cross-examination, whether he had not attempted to dissuade a witness for the plaintiff from attending the trial; he swore that he had not; and on its being proposed to bring evidence to contradict the witness on this point, Mr. J. Lawrence would not allow it, the fact being collateral to the issue; but he added, "I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when those questions are irrelevant to the issue upon record, you cannot call other witnesses to contradict the answers he gives." And in *Yewin's Case* (*k*) the same learned Judge allowed the

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(*f*) There are many instances in which a man may be a witness who cannot be a juror. 2 Hale, 278, 11 H. 4. One attainted and pardoned cannot be a juror. Per Holt, C. J., *Rookwood's Case*, 4 St. Tr. 642; but he may be a witness: the reason is, that a juror cannot be examined and sifted as to the grounds of his verdict, as a witness may as to his testimony. The ancient rule of law was otherwise.

(*g*) 4 Esp. C. 224.

(*h*) At the sittings of Westminster after Hil. Term 1818, a witness was compelled by his Lordship to answer the question, whether he had not been confined in a particular gaol. *Infra*, 197 (l).

(*i*) 4 Esp. C. 442; but see above, 190.

(*j*) 2 Camp. 637; cited in *R. v. Watson*, 2 Starkie's C. 116; but see above, 190.

(*k*) 2 Camp. 638, n.

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prisoner's counsel to ask a witness in cross-examination, whether he had not been charged with robbing his master. Where a man's liberty, or even life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted; they cannot look into his breast and see what passes there, but must form their opinion on collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in their inquiry, is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called upon to believe; and to know whether, although he has not been actually convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. In the case of *The King v. Edwards* (1), on an application to bail the prisoner, who was charged with felony, one of the bail was asked, whether he had not stood in the pillory for perjury? and upon objection being made that it tended to criminate the party, the Court held that there was no impropriety in the question, since his answer could not subject him to any punishment. The great question, therefore, whether a witness is *bound* to answer a question to his own disgrace, has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principal of which consists in a knowledge of the source or depository from which such testimony is derived: the whole question resolves itself into one of policy and convenience, that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury such as he is (m). As to the other

(1) 4 T. R. 440.

(m) Where the witness has been convicted of an infamous crime, he is absolutely disqualified, but the fact of conviction

cannot be proved except by the record; and it is in many instances impossible to be prepared with such evidence where it is not previously known that the

consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain.

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The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial, and, it may be added, but theoretical; for Courts are in the constant habit of permitting such questions to be put (*n*), and answers to be given and received as evidence for the consideration of the jury.

The decision of this question is of less practical importance than might have been expected, since, whether a witness be or be not bound to answer such questions as tend to his disgrace, it seems to be allowed that the questions may be put (*o*); and it is obviously of little consequence whether the witness admits that which is insinuated against him, or refuses to answer the question; for though in strictness no inference ought to be made as to the truth of a fact where the witness has refused to answer (*p*), yet the refusal must make an unfavourable impression upon the jury, since an honest man would naturally be eager to deny the fact, and rescue his character from suspicion, and would not refuse to answer merely because he had a strict legal right to refuse (*q*.)

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witness will be examined; in such cases there is the greater reason for allowing the question to be put in another shape.

(*n*) In the case of *Frost v. Holloway*, K. B. sittings after Hil. Term 1818, Ld. Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in gaol; and on the witness's appealing to the Court said, "If you do not answer I will send you there." *Ex relatione Gurney*. Upon the trial of *O'Coigly* and *O'Connor* (24 Howell's St. Tr. 1353), the witness having, upon a question being put which threw an imputation on him, appealed to the Court for protection in the first instance, the Court would not permit the question to be repeated.

In the case of *Cundell v. Pratt*, 1 Mo. & M. C. 108, the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J., interfered to prohibit the question; it was urged by Spankie, serj., that he had a

right to put questions tending to degrade a witness, for the purpose of trying his character.

Best, C. J.: "I do not forbid the question on that ground; I for one will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think, therefore, it ought not to be put."

(*o*) *Harris v. Tippet*, 2 Camp. 638; *R. v. Yewin*, 2 Camp. 638, n.; *R. v. Watson*, 2 Starkie's C. 116.

(*p*) *Rose v. Blakeman*, 1 Ry. & M. C. 384.

(*q*) See the observations of the Judges in *R. v. Watson*, 2 Starkie's C. 116.

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Where the question is so connected with the point in issue that the witness may be contradicted by other evidence if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal (*r*).

It was lately held by all the Judges, not only that a question, as to an act done by the witness, the answer to which might criminate him, might be put, in order to afford a foundation for contradicting him, if he denied the fact, but even that the adverse party could not without asking the question adduce such evidence to impeach the credit of the witness (*s*).

The privilege of refusing to answer is that of the witness, and not of the party; and Lord Tenterden refused to allow the question to be argued by the counsel of the party who called the witness (*t*).

Conse-
quence of
answering.

If a witness voluntarily answer questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be (*u*), and if he answers the question in part, he is bound to disclose the whole truth (*x*).

If a witness choose to answer a question to which he might have demurred, his answer may afterwards be used in evidence against him for all purposes (*y*). If a witness should admit that he had been guilty of a crime, his admission would not render him incompetent without proof of his conviction.

If a witness give an answer to a question put for the purpose of degrading his character, the party will be bound by his answer, and cannot adduce evidence in contradiction (*z*). This is but a

(*r*) *The Queen's Case*, 2 B. & B. 311.

(*s*) *Ib*.

(*t*) By Lord Tenterden in *Thomas v. Newton*, Mo. & M. 48, n.

(*u*) Per Dampier, J. Winchester Summer Ass. 1815, Mann. Ind. Witness, 222.

(*x*) *East v. Chapman*, Mod. & M. C. 47.

(*y*) *Smith v. Beadnall*, 1 Camp. 30; *Stockfleth v. De Tastet*, 4 Camp. 10.

(*z*) Lord Ellenborough, in *Watson's Case*, Gurney's Rep. vol. ii. 288, observed, "Whether he has been guilty of such a crime (improperly asking him in a degree, because you are calling upon him, upon the sanction of his oath, to answer that

which he is not bound to answer, for no man is bound to criminate himself), but if, from a desire to exculpate himself from the imputation of a crime, he gives an answer, it has been held by many of our Judges, and I never knew it ruled to the contrary, that having put such question, you must be bound by the answer. The Court is not a Court to try a collateral question of crime, and it would be unjust if it were, for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be adduced to charge him? There is no possibility of a fair and competent trial on that subject, and therefore in no instance is it done."

particular application of the general rule applicable in all cases of inquiry as to mere collateral facts.

If by an unfortunate or unskilful question put on cross-examination, a fact be extracted which would not have been evidence upon an examination in chief, it then becomes evidence against the party so cross-examining (a).

Effect of answer on cross-examination.

But a witness is not allowed voluntarily to obtrude inadmissible evidence, and if he do, it is not to be considered as evidence in the cause (b). This is a just and most important rule; a fraudulent and subtle witness will sometimes endeavour to baffle his cross-examiner, and deter him from pursuing his course, by introducing into his answers matters foreign to the question, but unfavourable to the cross-examining party.

In the course of the proceedings in the House of Lords in the *Queen's Case*, Louisa Dumont, a witness in support of the charge, having been asked, upon cross-examination, whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney-general that the letter itself ought to be put in before any use could be made of its contents.

Cross-examination as to writings.

The following questions were in consequence proposed to the Judges (d):—

First, Whether, in the Courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, Whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon show-

(a) *Wright dem. Clymer v. Littler*, Burr. 1244; 1 Bl. 346. The lessor of the plaintiff claimed under a will dated in 1743. The defendant relied on a will bearing date 1745. The plaintiff, in answer, called Mary Victor, the sister of William Medlicott, deceased, whose name appeared as an attesting witness to the will of 1745, to prove that her brother, in his last illness, and three weeks before his death, pulled out of his bosom the will of 1743, and said it was the true will of J. C. Upon cross-examination by the counsel for the defendants, the witness further

stated, that her brother, when he produced the will of 1743, acknowledged and declared that the will of 1745 was forged by himself. After a verdict for the plaintiff, upon a motion for a new trial, upon the ground, *inter alia*, that the declaration by Medlicott of his having forged the will of 1745, ought not to have been left to the jury, it was answered by the Court, that the fact came out upon the defendant's own cross-examination.

(b) *Blewett v. Tregonning*, 3 Ad. & Ell. 584; 5 N. & M. 300.

(c) *The Queen's Case*, 2 B. & B. 286.

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ing a witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines ; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter ?

The first question was answered in the negative, for the following reasons :—“ The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness ? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper ; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.”

To the second question, the Judges returned the following answer : “ In answer to the first part, ‘ Whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon showing the witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part ? ’ the Judges are of opinion, that that question should be answered by them in the affirmative in that form ; but in answer to the latter part, which is this, ‘ And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter ? ’ the learned Judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.”

Upon the further question proposed, “ Whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the Courts below, whether he did or did not make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein ; or whether the letter itself must be read as the

evidence to manifest that such statements are not contained in the letter?" the Judges were of opinion, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. They found their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence.

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To another question, viz. "In what stage of the proceedings, according to the practice of the Courts below, such letter could be required by counsel to be read, or be permitted by the Court below to be read," the learned Judges answered, that according to the ordinary rule of proceedings in the Courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel, who is cross-examining suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the Courts below; and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel; but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

In the course of the same proceeding, the counsel for the Queen, having cross-examined Giuseppe Sacchi, whether he had ever represented to any person, after he had left the service of the princess, that he had taxed himself with ingratitude towards a generous mistress; it was objected, that the witness should be asked whether such representation made by him was an oral or written one, because, if written, the writing itself should be produced before the question could be put. The following question was in consequence proposed to the Judges: "Whether, according to the established practice in the Courts below, counsel, in cross-examining, are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?"

The Lord Chief Justice, in delivering the opinions of the Judges

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observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel, precisely in those words, and were not aware of any established practice distinctly referring to such a question. He adverted to the rule of law respecting the examination of a witness as to a contract or agreement, in which case, if the counsel on one side were to put a question generally as to the contract, the ordinary course is for the counsel on the other side to interpose an intermediate question, whether the contract referred to was in writing, and if the contract should appear to have been in writing, then all further inquiry would be stopped, because the writing itself must be produced. With *reference to this established rule*, they considered the question proposed to them, and were of opinion that the witness could not properly be asked on cross-examination, whether he had written such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing. They held, also, that if the witness were asked whether he had *represented* such a thing, they should direct the counsel to ask whether the representation had been made in writing or by words; and if in consequence he should ask whether it had been made in writing, the counsel on the other side would object to the question; but if he should ask whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.

It seems to be perfectly clear, that if it appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been destroyed, the objection founded on the reasons alleged by the learned Judges ceases; and as the defendant may at all events, in his turn, adduce secondary evidence of the contents, there is no objection to his proving the contents in the first instance by means of the adversary's witness.

It is to be observed, that the opinions delivered by the learned Judges upon the preceding questions, were founded principally on the application of the principle, that the best evidence must be adduced which the case admits of, and on the supposition that the object of the cross-examination is to establish in evidence the contents of a written document as material to the cause. Where that is the case the objection is invincible.

But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry is material only as a test to try his memory and his credit.

Such evidence is usually admissible for no other purpose than to

try the credit or capacity of the witness ; what a witness stated on a former occasion, may be very material evidence to contradict him, or impeach his testimony, but can rarely be evidence of the fact stated ; and it is a remarkable circumstance, that the question was never in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised, whether a cross-examination as to something written by the witness, for the purpose, not of proving any fact in the cause, but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed examination for proving material facts, and whether the witness might not be cross-examined as to what he had written, without producing the writing, where, although not proved to be lost, it was not in the possession of the examining party. It is also observable that the answers are founded mainly, if not wholly, on the supposition that the writing to which the question relates is in the possession of the examining party.

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As the decisions of the Judges have, according to opinions entitled to consideration, left the question, whether a witness may not be cross-examined as to the contents of a written document, for the purpose of impeaching his credit, without producing the document, still open, it may not perhaps be deemed presumptuous to offer a very few remarks upon this subject.

Upon every question of this nature two considerations arise : in the first place, whether the practice be advantageous and desirable with reference to some particular object ; and if so, still whether, on the other hand, it may not be politic to exclude it, in order to avoid some inconvenience which would result from its reception greater than that which would accrue from its rejection.

That the permitting such a cross-examination may frequently supply a desirable test for trying the memory and the credit of the witness, admits of little doubt. If, for example, a witness profess to give a minute and detailed account of a transaction long past, such as the particulars of a conversation, or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. His inability under those circumstances to state whether he afterwards committed the details of the transaction to writing, or if he admitted that he did so, his inability to state whether he then gave the same or a different account, or his admission that he gave a different account, without being able to explain why he did so, must necessarily operate to a greater or less extent to show the imperfection of his memory.

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If a witness be called to prove the contents of a document written by another, which, it may be, he has seen but once, and that at a distant time, must it not be of the highest importance to ascertain whether his powers of memory are sufficiently strong to enable him to swear to the contents of a document written by himself at a later period relating to the same subject-matter? If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, the circumstance tends to impeach the faithfulness of his memory, even to a greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate, and more likely to remain impressed on the memory, than a mere oral communication; and the contradiction which the witness receives from the writing itself is also more important and more complete than that which results from the testimony of another, whose memory may be as liable to imperfection as that of the witness.

A cross-examination of this nature affords no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions which he is, on cross-examination, ultimately forced to avow; and it often happens, that by his palpable and disingenuous attempts to conceal the truth, he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give.

Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded, and the opportunity of contradicting him by the production of the document in opposition to his statement on oath, cannot occur.

These observations apply even although the writing containing the contradiction be in the possession of the party who cross-examines; but it may frequently happen that the document may have been lost, but that proof of the loss, and of the contents of the document, are in the power of the party cross-examining.

In such a case, if the rule were strictly adhered to, a dilemma would occur, the effect of which might be to exclude the contradicting evidence altogether. The adverse party would not be able to go into evidence of the contradictory document before he had, upon cross-examination, given an opportunity of explanation

to the witness, and he could not, according to the rule, examine as to the contents of the writing before he had proved the contents. At all events he would labour under a difficulty in securing the attendance of an adverse witness until such time as he had established the necessary proof (d).

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Such a cross-examination would also frequently afford a test of credit where the writing could not be produced, or its loss proved; for if the witness has in fact made statements in writing which, if produced, would impeach his credit, and either out of regard to his oath, or for fear of consequences, be induced to admit the fact, his answer, subject to the explanation which he may be able to give, must produce the same effect.

The objections on the score of policy are, on the contrary, of a limited nature, it being admitted on all hands that the answers given cannot be received as any evidence of the writing itself for the purposes of the cause. It is possible that the witness having written what was true, may not recollect what he has written, or, to go to the greatest extent, may, even mistakingly, and from defect of memory, admit (even contrary to the truth) that he has given a description of the transaction inconsistent with his present testimony; but even this would operate as a test to try his memory, and the result would show that his recollection was

(d) It has been suggested, that for the purpose of warranting the cross-examination of a witness as to the contents of a writing, which has in fact been destroyed, it is fit that the party proposing to cross-examine should be allowed to interpose evidence out of his turn to prove the fact of destruction, or, that if any inconvenience should result from pursuing this course, the Court should, in the exercise of its discretion, either admit the witness's statement in the first instance, or defer the cross-examination until the adversary shall have entered on his case. Without presuming to anticipate what course the Court might in its discretion adopt when the case occurred, it may be observed, that either to allow a party to break in upon the adversary's case by adducing proof to sanction the admission of secondary evidence, or to allow him to enter upon secondary

evidence, as it were, *de bene esse*, and subject to be established or defeated by the subsequent proof or failure of proof, would be going farther than any existing precedent seems to warrant. It has, indeed, been not unusual, after proof of a document by a witness under cross-examination, for the party cross-examining to have it read in that stage of the proceedings, by way of anticipation, as part of his own evidence; but there the proof is complete, and nothing remains but to read the instrument. On the contrary, in the case proposed the proof is incomplete, and the party may with much more reason object to the admitting secondary evidence, which may in the result turn out to have been wholly inadmissible, nay, which perhaps his opponent might render inadmissible, if it served his purpose, by afterwards omitting to support it by legal evidence*.

* It has been frequently ruled, that a defendant having given the plaintiff notice to produce writings in his possession, cannot cross-examine the plaintiff's witnesses as to their contents. *Graham v. Dyster*, 2 Starkie's C. 23; *Sideways v. Dyson*, *ibid.* 49.

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imperfect: a consideration of the highest importance where the witness is called to detail conversations or the contents of a written document; a task to which few memories are adequate under ordinary circumstances.

And instances may be cited where evidence is admitted for one purpose and object to which it is applicable, although with reference to other purposes and objects to which the evidence relates it is inadmissible and wholly inoperative. Thus, in the ordinary case where a witness is cross-examined as to oral declarations made by him and connected with the cause, evidence is constantly offered to prove those declarations, where he denies them, not with a view to prove the truth of a declaration, but in order to impeach his credit. If, for instance, in an action for goods sold and delivered, a witness called to prove the delivery of the goods were to deny that he said to *A. B.* that the defendant in fact never had the goods, it would be competent to the defendant to call *A. B.* to prove that the witness did in fact make that declaration, not with a view to affect the plaintiff by making the declaration evidence of the non-delivery (for it is no evidence of the fact), but to impeach the credit of the witness.

Here the question is allowed for the purpose of impeaching the testimony of the witness, although it involves a fact of which the answer would be no evidence. If so, then, if the very same statement were in writing, why might not the question also be allowable for the very same limited purpose, that is, to impeach the witness's credit, although to establish the truth of the written statement, viz. that the goods had not been delivered, it would afford no evidence whatsoever.

Again, upon the ordinary examination of a witness on the *voire dire*, he may, with a view to show that he is wholly incompetent, be examined as to the contents of a written document not produced; and the reason is, that it is not probable that the writing which creates his incompetency would be in the possession or within the knowledge of the adversary: a reason which would frequently apply in full force in the present instance (e).

To the objection that to allow such a cross-examination would be to deviate from the rule that the best evidence ought to be adduced that the case admits of, it may be answered that the prin-

(e) It is true, that if the witness upon examination on the *voire dire* has the instrument with him, it must be produced; for the reason for dispensing with its actual production, viz. the difficulty of procuring it, has ceased. *Butler v. Carver*, 2 Star-

kie's C. 433. But where a witness is cross-examined in relation to a writing, to try his credit, the reasons for permitting such cross-examination do not cease, although the party cross-examining be in possession of that instrument.

ciple of the rule is applicable only to evidence offered to prove a material fact, and is inapplicable where the object is merely to try the credit or ability of the witness. The objection that otherwise only part of a document might be proved, seems to admit of the same answer. Besides, if the witness did recollect what he had written, he would be entitled to state the whole, or at least so much as was material; and if he denied having written to the effect stated, he could not be contradicted without producing the document and reading the whole.

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With respect to any supposed hardship in the case of a witness who, having forgot what he had written, honestly gives an erroneous statement from recollection, it is not to be presumed that in case of contradiction, by the subsequent production of the document, he would incur any more serious imputation than the one established by the proof that his memory was not perfect; the hardship, on the other hand, which might accrue to a party whose property, or even life, depended on the jury's forming a true estimate of the witness's power of recollection, might be much more serious.

A party having produced a document in cross-examination, is not bound to read it before he comes to his own case, although he has shown it to the witness and cross-examined him upon it (*f*); and if a party, on cross-examination, obtains proof of a document, the adversary, it seems, has no right to see the paper for the purpose of cross-examining the witness as to the paper being in the handwriting of the party whose handwriting is sworn to (*g*).

And it has been held, that where a witness has been examined as to entries in a book, the adversary cannot cross-examine as to other entries which have not been used, without putting them in as evidence (*h*).

If, upon a writing being put into the witness's hand for the purpose of cross-examination, the cross-examination wholly fails, the adverse counsel is not entitled to look at the paper (*i*).

If a witness be called merely to produce a document which can be proved by another, and be not sworn, he is not subject to cross-examination (*k*).

(*f*) *Holland v. Reeves*, 7 C. & P. 36, cor. Alderson, B.

(*g*) By Bosanquet, J., in *Russell v. Rider*, 6 C. & P. 416.

(*h*) By Gurney, B., *Gregory v. Taver-non*, 6 C. & P. 680. But *semble*, he might use them to refresh the memory of the witness; a writing may (as has been

seen) be used for this purpose without making it evidence.

(*i*) *R. v. Duncombe*, 8 C. & P. 309.

(*k*) *Simpson v. Smith*. Not. Summ. Ass. 1822, cor. Holroyd, J., Phill. L. E. 260, and per Bayley, J., *Lancaster Spring Ass.* 1824.

Re-exami-
nation of
witness.

A witness may be re-examined by the party who called him, upon all the topics on which he has been cross-examined: this gives an opportunity of explaining any new facts which have come out upon cross-examination; but as the object of re-examining a witness is to explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination.

Where the witness has been cross-examined as to declarations made by him, a counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness (*l*).

It was formerly held that where a witness has been cross-examined as to a conversation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving him at the same time the benefit of the entire residue of what he said on the same occasion (*m*).

But in the *Queen's Case* eleven of the Judges were of opinion that the conversation of a witness with a third person stood upon a different footing, and was distinguishable from the case of a conversation with a party, on the following grounds, viz. "The conversation of a witness with a third person is not in itself evidence in the suit against any party in the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations, has been laid before the Court, the Court becomes possessed of all which can affect the

(*l*) *The Queen's Case*, 2 B. & B. 297.

(*m*) *Ibid.* 298.

character or credit of the witness, and all beyond this is irrelevant and incompetent (m).”

Re-examination.

But in the late case of *Prince v. Samo* (n) the Court of Queen's Bench, after much deliberation, overruled this distinction, and laid down a rule, founded in good policy, that whether the witness be cross-examined as to a conversation with a party to the suit or with a third person, the re-examination must, in the former case, as well as the latter, be confined to matters connected with the evidence given on cross-examination, as tending to show its true nature and bearing. The action in that case was for a malicious arrest for money alleged by the plaintiff to have been given to him. The plaintiff called as a witness his attorney, who having been present when the plaintiff was examined as a witness on an indictment for perjury, stated, on cross-examination, that the plaintiff on the

(m) Upon these grounds, eight of the Judges (Best, J., *dissentiente*) were of opinion, that if on the trial of an action or indictment, a witness examined on behalf of the plaintiff or prosecutor, upon cross-examination by the defendant's counsel, states that at a time specified he told A. that he was one of the witnesses to be examined against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff or prosecutor's counsel cannot further re-examine the witness as to such conversation, even so far only as it relates to his being one of the witnesses.

Abbott, C. J., in delivering the opinion of the Judges, observed, “The question as proposed by the House contains these words, ‘and being re-examined, had stated what induced him to mention to A. what he had so told him;’ by which I understand that the witness had fully explained his whole motive and inducement to inform A. that he was to be one of the witnesses; and so understanding the matter, and there being no ambiguity in the words, ‘I am to be one of the witnesses,’ I think there is no distinction between the previous and subsequent parts of the conversation, and I think myself bound to answer your Lordships’ question in the negative.”

His Lordship then gave the reasons of the eight Judges for distinguishing between a conversation between the witness and a

party, and one between the witness and a third person, to the effect above stated.

Best, J. was of opinion that the rule which was acknowledged to have been settled as to conversations of a party to the suit, applied with equal reason and force to the statements and conversations of a witness; and held, that if one part of the conversation of a witness has been drawn from him by cross-examination with a view of disparaging his testimony, the whole of what passed in that cross-examination ought to be admitted on re-examination. That this is justly due to the character of the witness, who is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence; it was due to him also as a security against proceedings which might otherwise be instituted against him on statements partially extracted on cross-examination.

The Lord Chancellor and Lord Redesdale also differed from the majority of the Judges. As the learned Judges were pleased to guard their opinion by stating that they understood the question to assume that the witness had fully explained his whole motive and inducement to inform A., the decision in the particular instance thus presented to them does not go the length of excluding the cotemporary statement made by the witness where it would be the best exposition of his real motives.

(n) 3 Nev. & P. 139.

Re-examination.

trial of the indictment admitted that he had repeatedly been insolvent and remanded by the Court. It was proposed, on re-examination, to inquire whether the plaintiff had not also upon the same occasion stated the circumstances out of which the arrest had arisen, and what that statement was. Lord Denman, on the objection being taken, rejected the evidence on the ground, "that the witness might be asked as to every thing said by the plaintiff on the trial of the indictment that could in any way qualify or explain the statement to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it." On a motion for a new trial the Court held, that the same rule which applied to statements made by a witness applied also to those made by a party; and, after observing that the opinion of Lord Tenterden was extra-judicial, and not in terms adopted by Lord Eldon and the Judges, who concurred in the answer to the proposed question, and was expressly denied by Lords Redesdale and Wynford, added: "In our opinion the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested. Nothing would be more easy than to find or imagine examples of the extreme injustice that might result from allowing such statements to be received; but none can be stronger than the actual case. Because the plaintiff was shown to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove by his discourse at the same period every averment in his declaration, with every circumstance likely to excite prejudice and odium against the defendant; and if this were evidence, the jury would be bound to consider and give full effect to it, and thus award large damages for an injury of which no particle of proof could be given excepting the plaintiff's own assertion."

A contrary rule would be supported by a specious, but in this and in several other instances a fallacious principle; for whilst it may, at first view, seem to be conducive to enlarged views of policy and convenience to admit the whole of a particular conversation where part of it is given in evidence, and so to afford to the jury the most ample means for attaining to the truth, yet here the reverse is true; for were this to be allowed, parties apprehensive of the unjust consequences so forcibly represented in the foregoing judgment, would frequently be deterred from giving any such admission or statement by the adversary in evidence; and thus the means of information afforded to the jury would be narrowed rather than enlarged by the more extensive rule.

Where a witness, on cross-examination, varies from the state-

ment made on his examination in chief, the party calling him (it has been held) may, on re-examination, inquire into facts to show that the witness had been induced to betray that party (*m*). Re-examination.

It has already been seen that a witness cannot obtrude evidence on cross-examination which he could not have given in chief; but if counsel voluntarily cross-examine as to inadmissible matter, the adverse counsel is entitled to examine upon it (*n*).

It seems that the Court will, after a case is closed, allow a witness to be called back, or receive fresh evidence, to get rid of objections which are beside the justice of the case, and little more than mere form, but not to get rid of any difficulty on the merits. Where the question was as to the petitioning creditor's debt on a bill of which the bankrupt was the drawer, and no proof of any default by the acceptor had been shown, the Court allowed a witness to be called, after the case had been closed, to prove the dishonour and notice to the bankrupt (*o*). Recalling witness.

The credit of a witness may be impeached either by cross-examination, subject to the rules already mentioned, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves. Credit of witness, how impeached.

It is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue (*p*); for this would cause the inquiry, which ought to be simple and confined to the matters in issue, to branch out into an indefinite number of issues. The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burthen of collateral proof, that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges which might thus be brought against him, without previous notice; and though every man may be supposed to be capable of defending his general character, he cannot be prepared to defend himself against particular charges of which he has had no previous notice (*q*). Questions put to a witness him-

(*m*) *Dunn v. Aslett*, 2 Mood. & R. C. 122.

(*n*) *Blewett v. Tregonning*, 3 Ad. & Ell. 584; 5 Nev. & M. 308.

(*o*) *Giles v. Powell*, 1 Carr. & P. 259. *S. P. Walls v. Atcheson*, *ibid.* 269.

(*p*) See Vol. II. tit. CHARACTER.

(*q*) *R. v. Watson*, 2 Starkie's Cas. 151. Gurney's Rep. of same case, vol. ii. p. 288. *Laver's Case*, 6 State Tr. 298. 316. *Rothwood's Case*, 4 State Tr. 603. B. N. P. 296. See also *Sharp v. Scoging*, Holt's C. 541. *De la Motte's Case*, Howell's State Tr. 811. *Mawson v. Harsink*, 4 Esp. C. 102.

Character
of witness,
how im-
peached.

self upon cross-examination are not, it may be observed, open to this objection, since his answer is conclusive as to all collateral matters. The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, whether he could believe him upon his oath? When general evidence of this nature has been given to impeach the credit of a witness, the opposite party may cross-examine as to the grounds upon which that belief is founded (*r*).

By proof of
declarations,
&c.
by the wit-
ness.

In the next place, the witness may be contradicted by others who represent the fact differently, or by proof that he has said or written that which is inconsistent with his present testimony; for this purpose a letter may be read in which he has given a different account of the matter (*s*).

It is a general rule, that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared (*t*), or done that which

(*r*) Where a party states that he would not believe a witness on his oath, it is no objection that he has never heard him examined on his oath, if he have, from previous knowledge of his character, reasonable ground of belief that his word cannot be trusted on oath. *R. v. Bipsam*, 4 Carr. & P. C. 392.

(*s*) *De Sailly v. Morgan*, 2 Esp. C. 691. The action was by a schoolmaster, for the board and education of the defendant's sons: the defence was, his neglect of the scholars, &c. A witness for the plaintiff, the usher of the school, swore that the treatment of the scholars was proper: and to contradict him, a letter written by him to a former scholar, containing immoral matter, was read in evidence.—So a prosecutor, in a criminal case, may contradict a witness by means of his deposition before the magistrate. *Oldroyd's Case*, Vol. II. tit. DEPOSITIONS.—In a civil action, in order to contradict a witness who had sworn differently in an answer to a bill in equity; held, that the identity of the person and answer being ascertained, an examined copy of the answer was sufficient, although it might go to affect the character of the witness. *Ever v. Ambrose*, 6 D. & R. 127; 4 B. & C. 25. So is an examined office-copy of his deposition. *Highfield v. Peake*, 1 Mood.

& Mal. C. 109. But a conviction before a magistrate, purporting to set out the deposition of a witness, is not sufficient evidence of his having made that deposition for the purpose of contradicting him. *R. v. Howe*, 1 Camp. 461; 6 Esp. C. 125. The courts of Scotland exclude such evidence, upon the principle that the witness ought to deliver his testimony unfettered by previous declarations. Hume's Comm. on Crim. Law of Scotland, vol. ii. p. 367. Burnet's Treatise, p. 467. The policy of this rule is, to say the least, questionable; if it relieve a well-disposed witness from embarrassment in stating the truth, it also relieves a fraudulent one from the difficulty of explaining a statement made at a time when he was under no temptation to deceive, and thereby exclude a considerable test of credit. An honest witness will disclose the truth in spite of any prior declaration; a dishonest one would certainly be encouraged by the exclusion. It seems to be the wiser policy not to yield a test of truth, at a certain sacrifice, for the sake of an advantage so doubtful.

(*t*) *The Queen's Case*, (2 B. & B. 300) on a question proposed to the Judges.—The following questions were proposed by the House of Lords to the Judges.—“If a witness in support of a prosecution has been examined in chief, and has not been asked in

is intended to be proved. For in every such case, there are two questions, first, whether the witness ever did the act or used the expressions alleged; secondly, whether his having done so, impeaches his credit, or is capable of explanation. It would be manifestly unjust to receive the testimony of the adversary's witness to prove the fact, without also admitting the party's witness to deny it; and, assuming the act to have been done, or expression used, it would be also unjust to deny to the party or the witness who admits the act or expression, the best, or it may be the only means of explanation. If the witness admit the words, declaration, or act, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the Court at once, which is the most convenient course (*u*).

By proof
of declara-
tion, &c.

It is not enough to ask a witness (in order to found a contradiction) the general question whether he has ever said so and so, but he must be asked as to the time, place, and person involved in the supposed contradiction (*v*).

Inquiry
previous to
contradiction.

If the witness deny the words, declaration, or act imputed to him, then, if it be not a matter collateral to the cause, witnesses may be called to contradict him (*x*).

If the witness neither directly admit nor deny the act or declaration, as where he merely says that he does not recollect, or, as it seems, give any other indirect answer not amounting to an admission, it is competent to the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said, by answering that he did not remember (*y*).

cross-examination as to any declaration made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, would it be competent to the party accused to examine witnesses in his defence, for the purpose of proving such declarations or acts, without first calling back the witness to be examined or cross-examined as to the fact whether he ever made such declarations or did such acts?" Again, "If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after cross-examination, they discover that the witness so examined has corrupted or endeavoured to corrupt another

person to give false testimony in such cause, whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?" The Judges held, that the proposed proof could not in either case be adduced without a previous cross-examination of the witness as to the subject-matter.

(*u*) By the Judges, in the *Queen's Case*, 2 B. & B. 313.

(*v*) *Angus v. Smith*, 1 Mood. & Malk. C. 474.

(*x*) 2 B. & B. 313, and *supra*.

(*y*) *Crowley v. Page*, 7 C. & P. 701, cor. Parke, B., who observed, "If the

Evidence in
contradiction.

The witness having been asked, on cross-examination, if he has not used particular expressions, in order to lay a foundation for contradicting him, upon his denial, the witness called to prove that he did use them, may be asked as to the particular words read from the brief (*z*).

If the witness decline to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof (*a*). And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances, and to exculpate himself (*b*). And it is of great importance that this opportunity should be thus afforded, not only for the reasons already suggested, but because such explanation, if not given in the first instance, may be rendered impossible; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at an end (*c*).

There is no distinction for these purposes between declarations made by the witness, and acts done by him which relate to the cause (*d*); in the one case as well as the other, an opportunity must be afforded the witness of explaining his conduct before evidence is adduced to impeach his credit by proof of the fact.

If the adverse counsel has omitted to lay such a foundation by previously interrogating the witness on the subject of those declarations, the Court will, of its own authority, call back the witness, in order that the requisite previous questions may be put (*e*).

And even although the fact to be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given for the purpose of thus impeaching his testimony without previous examination of the witness, even although the witness

witness, on cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember." Tindal, L. C. J.

is stated to have ruled the contrary in an earlier case. *Pain v. Beeston*, 1 Mood. & R. C. 20.

(*z*) *Edmonds v. Walter*, 3 Starkie's C. 8.

(*a*) *The Queen's Case*, 2 B. & B. 314.

(*b*) *Ibid*.

(*c*) By the Judges, in the *Queen's Case*, 2 B. & B. 314.

(*d*) *The Queen's Case*, *ibid*.

(*e*) By the Judges, in the *Queen's Case*, 2 B. & B. 314.

should have departed the court, and cannot be brought back after the discovery has been made (*f*).

Evidence in contradiction.

In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving his previous testimony on an information before two magistrates against the same defendant for having smuggled goods in his possession, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said (*g*). The record of conviction is conclusive for the purpose for which it is intended, that is, to prove the condemnation; but it is no evidence to prove the testimony of the witnesses.

After proof in a criminal proceeding that the prosecutor has employed *A. B.* an agent, to procure and examine witnesses in support of the charge, it is not competent to the defendant to examine a witness to prove that *A. B.* who is not examined as a witness, had offered a bribe to give evidence upon the trial, or to bring papers with him belonging to the defendant; for the mere employment of an agent for the purpose of procuring and examining witnesses is in itself an innocent, and in many cases a necessary act, and it is not to be presumed that the prosecutor directed the agent to use any unlawful means for the purpose; neither can any legitimate inference or conclusion be drawn from this fact against the credit and veracity of the witnesses who are examined; for it is not to be presumed, in the absence of all proof, that they were either parties to the illegal act, or privy to it, or to any act of the like nature (*h*).

As upon an indictment for a conspiracy it is competent to the prosecutor to prove, in the first instance, the existence of a conspiracy, by general evidence, without proving participation by the defendant (*i*), so it is competent to a defendant on a criminal charge, first to prove a conspiracy to suborn witnesses for the destruction of his defence, and afterwards to affect the prosecutor by proof of his participation (*k*), provided proof of such a conspiracy would afford a legitimate ground of defence (*l*).

A party cannot discredit the testimony of his own witness, by general evidence of incompetency; for it would be unfair that he

A party not allowed to discredit his own witness.

(*f*) *The Queen's Case*, 2 B. & B. 212.

(*g*) *R. v. Howe*, 1 Camp. 491, cor. Ld. Ellenborough.

(*h*) By the Judges, in the *Queen's Case*, 2 B. & B. 302.

(*i*) Vol. 11.; 2 B. & B. 303.

(*k*) *The Queen's Case*, 2 B. & B. 303.

(*l*) 2 B. & B. 311. *Quære* in what cases proof of a crime committed by a prosecutor in so conspiring can afford any legal defence to a defendant.

A party
when al-
lowed to
contradict
his own
witness.

should have the benefit of the testimony if favourable, and be able to reject it if the contrary (*m*). Where, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony (*n*). And even where a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. And their testimony, which would have been admissible had they been called first, cannot in principle be excluded by the circumstance of being called in a different order. Accordingly, where a plaintiff had called the servant of the defendant to prove a warranty of a horse, upon which the action was founded, and the witness denied that he warranted the horse, the plaintiff was allowed to prove the fact by means of other witnesses (*o*).

A witness called by the plaintiff in an action on a policy of insurance against fire, to prove the sale of goods to the plaintiff, denied the sending of any goods to the plaintiff, and swore, on his examination in chief, that an invoice of the goods in his handwriting was made out by him after the fire, and that a letter, in his handwriting, was in fact written in London, at the plaintiff's house, and by his desire, and that the plaintiff's son and shopman had persuaded him to say that he had sent the goods. Lord Tenterden refused to allow the son and shopman to be called again to negative this statement, but the Court of K. B. granted a new trial, for the evidence was offered to prove a material fact relevant to the issue, and it was held that, by such evidence, a party might contradict his own witness (*p*).

Where a party, being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated (*q*). Doubt has been entertained on the

(*m*) Per Buller, J., B. N. P. 297. See also *Hastings's Trial*, 2 Hawk. c. 46, s. 208, Leach's edition. Nor can he object to the admissibility of evidence, after having allowed it to be given. *Webb v. Smith*, 1 Ry. & M. 206.

(*n*) As in the remarkable case of Mr. Jolliffe's will. See tit. WILL; and see *Alexander v. Gibson*, 2 Camp. 556.

(*o*) *Alexander v. Gibson*, 2 Camp. 556;

and see *Richardson v. Allan*, 2 Starkie's C. 556. *Ewer v. Ambrose*, 3 B. & C. 746. *Friedlander v. Royal Exchange Assurance Company*, 4 B. & Ad. 193. *Wright v. Beckett*, 1 Mood. & R. C. 429.

(*p*) *Friedlander v. The London Assurance Company*, 4 B. & Ad. 193.

(*q*) *Bradley v. Ricardo*, 8 Bing. 57. The whole is, it seems, open to the consideration of the jury.

question whether it be competent to a party to impeach the testimony of his own witness as to a particular fact, by proof that on a former occasion he gave a different account, and so to contradict him by his own statement. The resolution of this doubt depends, as it seems, on the consideration whether, in the abstract, such evidence is essential to justice, and if so, then whether the party is to be excluded from such evidence, either by reason of any objection in the nature of an estoppel, or of any collateral inconvenience which might result. As a general proposition, it is essential to justice that in a case where the testimony of two witnesses upon a question of fact is contradictory, every aid should be afforded to enable the jury to decide which of them is better entitled to credit. And there can be no doubt that, in such a case, the knowledge that one of those witnesses on a former occasion gave an account of the matter inconsistent with his present testimony is of importance in order to enable them to form a correct conclusion. It is admitted on all hands that a party may, by such means, impeach the credit of his adversary's witness; and it is manifest that a third party, vested with the discretion of calling what witnesses he thought fit for the ends of justice, would, in the exercise of that discretion, submit the contradiction to the jury. It has indeed been decided, in a criminal case, that it is competent to a Judge to do this. Upon the trial of an indictment for murder (*r*), the Judge, in his discretion, thought fit to call as a witness the mother of the prisoner, whose name was indorsed on the indictment, but who had not been called by the counsel for the prosecution. Her evidence tended to acquit the prisoner, and the Judge, with a view to impeach her credit, referred to her deposition; and all the Judges were of opinion that it was competent to the Judge to do so; and it is material to observe, that Lord Ellenborough and Mansfield, L. C. J. intimated that the prosecutor had the same right.

A party when allowed to discredit his own witness.

If, as an abstract position, it be essential to the end of truth that such evidence should be submitted to a jury, it remains to consider, in the first place, whether the party having called the witness is, as it were, to be estopped from afterwards so impeaching his credit. It is difficult to come to this conclusion. A party who is prepared with general evidence to show that a witness whom he calls is wholly incompetent, acts unfairly and inconsistently; for knowing his witness to be undeserving of credit, he offers him to the jury as the witness of truth, and attempts to take an unfair advantage, by concealing or disclosing the real character of his

A party
when al-
lowed to
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witness.

witness, as best serves his purpose. But a party may contradict his own witness in the mode in question, without incurring any such blame; he may have been purposely deceived by the witness, or, though not under a legal necessity to call him, may be constrained by paucity of evidence under the particular circumstances; as where he cannot easily prove some other fact except by the testimony of that witness, or where the not calling him might afford a ground for strong observation against him. It may frequently happen in such cases that a party may with great propriety call a witness as to a particular fact, and yet impeach his testimony upon another material fact, of which the witness, without intending to deceive, may have obtained but an imperfect knowledge, or in respect of which his memory may have erred.

It may happen that, although under no legal necessity to call a particular witness, he may have none other than an adverse witness to prove a material fact. In such a case, it would frequently be attended with great hardship to preclude the party from using such means as he possessed, to show that the witness admitted only such facts as he could not with safety deny, but misrepresented some other material fact in which he could not be contradicted, and where the testimony, though false, would not expose him to a prosecution for perjury. It might happen, for instance, that in an action by two partners, for goods sold and delivered, an adverse witness might be the only one who could be called by the plaintiffs to prove the sale and delivery; a fraudulent witness as to this might be obliged to state the truth, for fear of a prosecution for perjury, but still he might with safety defeat the action by proof of payment to himself, as the agent of the plaintiffs, or by other evidence which would not expose him to a prosecution for perjury. In such, and many other cases which might be put, it would be a harsh rule to exclude the party from defeating the attempt by evidence of the witness's own statements on the subject.

In the case of an adverse witness, it may frequently happen that what he states in favour of the party who calls him, may be regarded as truth unwillingly wrung from a reluctant witness, whilst his counter-statements are open to great suspicion; in all such cases, former declarations by the witness are obviously of importance, with a view to ascertain what part of his statement ought to be discredited, whilst credit is given to the rest. The ordinary rules as to the examination of an adverse witness, supply an analogy in favour of the affirmation of the present question, in all cases at least where the witness is apparently an adverse one. Considering the admission of such evidence, in its tendency to occasion collateral

inconvenience, the argument that a party ought not to be allowed to discredit his own witness, by general evidence, seems to have little weight; the contradiction proposed being plainly distinguishable, as already observed, from any general impeachment of the witness's character, by evidence showing him to be altogether unworthy of credit. It would, as was observed in the case of *Friedlander v. The Royal Assurance Company (s)*, be against all justice that the whole of a man's testimony should be struck out because a witness sets him right as to a single fact. A party may with perfect propriety and consistency insist on the general competency of his witness, although he alleges that his testimony as to one particular fact is erroneous. It may be urged that the practice may open a door to collusion, and that a jury may mistake such a statement for substantive evidence. The suspicion of collusion in such a case is at most but weak, when it is considered how remote would be the expectation of benefit to be derived from it. A party might, no doubt, by such means, fraudulently introduce into the evidence a former statement by his own witness in his favour; but it could not be of any use, unless the jury, against the direction of the Judge, should regard it as substantive evidence. The latter objection would operate with equal force to exclude such evidence, when offered, to impeach the adversary's witness.

A party when allowed to discredit his own witness.

It has been truly observed, that to allow the evidence of a party's own witness to be impeached by other evidence to the contrary, is not founded on any principle generally warranting such an impeachment of credit by the party who calls the witness, for the witnesses are not called directly to discredit the first witness, the impeachment of his credit is incidental and consequential only. But although the practice of contradicting by other evidence may supply no affirmative argument for contradiction by the witness's own statement, it is observable that such practice shows that the discrediting of the witness is not a consequence which ought to exclude such evidence as the justice of the case may otherwise require. The admission of this kind of evidence seems to stand upon a substantive reasonable foundation. For such a course is in the abstract essential to the forming a correct estimate of the respective degrees of credit due to conflicting witnesses; and it is at most but doubtful whether the exclusion of such evidence is warranted upon any collateral grounds of convenience. In the case of *Wright v. Beckett (t)*, Lord Denman having received

(s) 4 B. & Ad. 193. By Parke, Taunton, and Patterson, Js.

(t) 1 Mood. & R. C. 427. In the case

of *Ewer v. Ambrose*, 3 B. & C. 746, cited below, Mr. J. Bayley, seemed to be of opinion (although it was unnecessary to decide

A party
when al-
lowed to
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his own
witness.

such evidence, the case was argued before Lord Denman and Mr. Baron Bolland, as Judges of the Court of Common Pleas at Lancaster; Lord Denman cited the case of *Bernasconi v. Fairbrother*, in which he had received similar evidence, and in his judgment on the principal case, he adhered to the same opinion. Mr. Baron Bolland was of opinion that the evidence was inadmissible, and Lord Denman stated that others of great weight and authority agreed with Mr. Baron Bolland.

It is observable, that the case of a witness thus giving evidence of a fact tending to negative the claim made by his party, is distinguishable from that of a witness who denies all knowledge of the fact, or simply fails in proving the fact which he is called to prove. In the former, it may be essential to justice that the jury, who might otherwise attribute too much credit to the testimony of the witness, should be supplied with the means to enable them to judge of the degree of credit which they ought to give; but in the latter, the witness proving nothing, his credit is immaterial, and what he stated upon any former occasion cannot be received as substantive evidence (v). Upon the trial of Warren Hastings, the Judges delivered the following answer, by the Lord Chief Baron, to a question proposed by the House of Lords: "That where a witness, produced and examined in a criminal proceeding by the prosecutor, *disclaimed all knowledge* of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness before a Committee of the House of Commons, or in any other place, and by demanding of him whether the particulars so suggested were not the answers he had so made" (x). In the case of *Ewer v. Ambrose* (y), a witness, called by the defendant to prove a partnership between himself and the defendant, having denied the fact, an answer of the witness in Chancery was offered in evidence by the defendant's counsel, and admitted. It was left to the jury to find for the plaintiff or defendant, according to the credit given to the witness's answer in Chancery or in Court. After a verdict for the defendant, the Court granted a new trial, on the ground that the answer was not substantive evidence of the fact.

the point) that the answer in Chancery was inadmissible altogether. Holroyd and Littledale, Justices, expressed no opinion.

(v) *Ewer v. Ambrose*, 3 B. & C. 746.

(x) Journ. D. P., Ap. 10, 1788. The witness had been asked by the managers for

the Commons whether he had not been examined before a Committee of the House of Commons, and whether he had not before that Committee given a particular answer to a particular question.

(y) 3 B. & C. 746.

Evidence
in confir-
mation of
witness.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses (*z*); but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness (*a*) by general evidence of good conduct.

Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence, or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character (*b*). So if the character of the attesting witness to a deed or will, be impeached on the ground of fraud, evidence of his general good character is admissible (*c*), whether he be living or dead. But mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the part of either, supplies no ground for admitting general evidence as to character (*d*).

Where an attested document is disputed on the ground of fraud, and one of the attesting witnesses impeaches the credit of the other attesting witnesses, general evidence may be given of the good character of the latter, for the credit due to their attestation is put in issue by the evidence on the other side (*e*). It seems to be the better opinion that a witness cannot be confirmed by proof that he has given the same account before, even although it has been proved that he has given a different account, in order to impeach his veracity; for his mere declaration of the fact is not evidence. His having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in

(*z*) *Bishop of Durham v. Beaumont*, 1 Camp. 207. There the witnesses simply contradicted each other, and no fraud was imputed to either.

(*a*) *R. v. Clarke*, 2 Starkie's C. 241. Where the prosecutrix, upon an indictment for an attempt to commit a rape, having been cross-examined as to her having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution.

(*b*) See *R. v. Clarke*, 2 Starkie's C. 241.

(*c*) *Doe d. Walker v. Stephenson*, 3 Esp. C. 284; 1 Camp. C. 210; 4 Esp. C. 50. *Provis v. Reed*, 5 Bing. 435. But a mere statement by a deceased attesting witness is not admissible to confirm nor to impeach his credit, even although he admitted that the instrument was forged. See tit. DEATH-BED DECLARATION. *Stobart v. Dryden*, 1 M. & W. 615.

(*d*) *Bishop of Durham v. Beaumont*, 1 Camp. 207.

(*e*) *Doe v. Stephenson*, 3 Esp. C. 284; 4 Esp. C. 50; 1 Camp. 210.

Evidence
in confir-
mation.

general carry his credibility further than, nor so far as, his oath (*f*). But although such evidence be not generally admissible in confirmation of a witness, there may be many cases where under special circumstances it possibly might be admissible; as, for instance, in contradiction of evidence tending to show that the account was a fabrication of late date, and where consequently it becomes material to show that the same account had been given before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen. So, where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is sometimes admissible in evidence; as upon an indictment for a rape (*g*), or upon an action for a trespass and assault committed on the wife (*h*).

Where a register of baptism stated the child to be seven years of age at the time of baptism, it was held that the entry was no evidence to prove the age, on an issue to try whether the party was of age when he was arrested. But Bayley, J. expressed an opinion, that if it could have been shown that the entry had been made upon the representation of the mother, who was called as a witness for her son, in order to prove his minority, the fact would have been admissible to support her testimony upon its being impeached (*i*).

On appeal. Unless there be some legislative provision to the contrary, it is no objection that a witness called to support the appellant's case before a court of appeal was not examined before the original court (*k*), even although the party who obtained the con-

(*f*) B. N. P. 294. Buller, J. was clearly of opinion that such evidence was not admissible to support an unimpeached witness, and doubted whether it was evidence in reply. In the case of the Berkeley Peerage, 5th June 1811, Lord Redesdale held that, in general, declarations made by a witness at another time could not be examined into for the purpose of supporting his testimony; and he referred to a case where Lord C. J. Eyre rejected such evidence when offered for the prisoner in a case of perjury. On the other hand, see Gilb. Ev. 135. *Lutterel v. Raynell*, 1 Mod. 282. *Friend's Case*, 4 St. Tr.

613. *Harrison's Case*, 12 Howell's St. Tr. 861.

(*g*) *R. v. Clarke*, 2 Starkie's R. 242. *Brazier's Case*, East's P. C. 444. It seldom, however, happens, that in such a case, an attempt is not made to impeach the credit of the witness.

(*h*) *Thompson and his Wife v. Trevanion*, Skinn. 402; 6 East, 193.

(*i*) *Wißen v. Law*, 3 Starkie's C. 63.

(*k*) *R. v. Commissioners of Appeals*, 3 M. & S. 133. *Breedon v. Gill*, 1 Ld. Raym. 219; S. C. Salk. 555; 5 Mod. 271. The stat. 48 Geo. 3, c. 74, s. 15, upon convictions relating to malt, enacts that the

viction is liable to double costs on a reversal of the conviction (l).

WRITTEN INSTRUMENTS are, *first*, of a public nature; *secondly*, of a private nature; *thirdly*, of a mixed nature, partly public and partly private; *public* documents, again, are either judicial, or *secondly*, not judicial; and with a view to their means of proof, they are either, *first*, of record; or, *secondly*, not of record. Before the admissibility and effect of public documents are considered, it will be convenient to consider *generally* the means by which public documents are to be procured and proved.

Proof of public documents in general.

If the question be as to the existence or contents of a *record* in the same court, the trial is by inspection of the record itself (m). Where the disputed record is one of another court, the tenor may be obtained by means of a *certiorari* and *mittimus* out of Chancery (n); for it would be inconvenient to remove the original. Where the record of an inferior court is disputed in a superior court, the record itself, where it is necessary, and in other cases the tenor, may be removed by *certiorari* out of Chancery (o), or other higher court (p). In criminal cases, where a prisoner pleads *auterfoits acquit*, he may remove the record by *certiorari*, if he be arraigned in the King's Bench (q). In other cases, he may remove the tenor of the record of acquittal into Chancery by *certiorari*, and either produce it in court with his own hands (*en poigne*), or procure it to be sent to the Justices *sub pede sigilli* (r). But the record in such case must be removed by writ, although the Justices may receive a record without writ, where it is to be proceeded on for the King (s).

How procured*.

same witnesses, and no other, shall be examined upon appeal. On a writ of attain, no other evidence can be given before the grand jury than that which was before given before the petit jury. But there the question is, whether the jury gave a false verdict on the evidence before them.

(l) Ibid.

(m) Nul tiel record was pleaded to the Composition Act; 2 Salk. 506. Holt, C. J. held that an exemplification was necessary, although a copy printed by the King's printer would be sufficient evidence before a jury. Anon. 2 Salk. 506, *infra*.

(n) *Pitt v. Knight*, 1 Saund. 98. *Hewson v. Brown*, 2 Burr. 1034. *Luttrell v. Lea*, Cro. Car. 297.

(o) *Butcher and Aldworth's Case*, Cro. Eliz. 821. *Guilliam v. Hardy*, 1 Ld. Raym. 216.

(p) 2 Atk. 317. *Guilliam v. Hardy*, 1 Ld. Raym. 216.

(q) 20 Ed. 2, Coron. 232; Starkie's Crim. Pl. 300. The usual practice is for the clerk of assize or of the peace to make up the record and produce it in court without writ, 2 Russ. on Crimes, 720.

(r) 2 Hale, 242; 2 E. 3. 26, Coron. 150.

(s) 2 Hale, 242; 8 Ed. 4, 18; B. Coron. 218.

(*) See tit. INSPECTION and PUBLIC DOCUMENTS.

Proof of public documents by exemplification.

A record may be proved either, first, by *mere production*, without more; or, secondly, by *copy*.

Copies of records are either *exemplifications*, or, *secondly*, copies made by an authorized officer; or, *thirdly*, sworn copies.

First, Exemplifications. These are, first, exemplifications under the great seal; or, *secondly*, under the seal of a particular court (*t*). The reason of admitting a copy to be evidence in such cases, is the inconvenience to the public of removing such documents, which may be wanted in two places at the same time (*u*). A record to be exemplified under the great seal must either be a record of the Court of Chancery, which is the centre of all the courts, or must be removed thither by *certiorari* (*x*). Nothing but records can be given in evidence exemplified under the great seal, for these are presumed to be preserved by the Court free from erasure or interlineation, to which private deeds are subject (*y*), which are in the hands of private persons. Where any record is exemplified, the whole must be exemplified, for the construction must be gathered from the whole taken together (*z*). An exemplification under the broad seal is of itself a record of the greatest authenticity (*a*).

Exemplification under the seal of the court.

Secondly, Under the seal of the Court. The seals of the King's courts of justice are of public credit, and are part of the constitution of the courts, and supposed to be known to all (*b*); and this, whether the court has existed from time beyond memory, or has been recently created by act of parliament (*c*). But the seals of private courts and persons are not receivable in evidence, unless proved to be the seals of the respective courts or persons (*d*). In general the exemplification of any record under the seal of one of the King's courts of justice is sufficient (*e*). So is an exemplification of a commission and return under the seal of the Exche-

(*t*) Gil. Ev. 12.

(*u*) Bac. Ab. Ev. 620.

(*x*) Bac. Ab. Ev. F., B. N. P. 226;
3 Ins. 173; 10 Co. 93, a.

(*y*) B. N. P. 227; Bac. Ab. Ev. F.;
3 Ins. 173; Gil. Ev. 12.

(*z*) 2 Ins. 273; Gil. Law Evid. 17.
But this rule is to be taken with some restriction. Vide B. N. P. 217.

(*a*) Gil. L. E. 14; Bac. Ab. Ev. 610;
Sid. 145; Hard. 118; Plowd. Comm.
411 (n.)

(*b*) Gil. L. E. 17, 20; 10 Co. 93, a.

(*c*) Sid. 146; Gil. L. E. 20.

(*d*) Gil. L. E. 20; and therefore, formerly, it seems to have been the practice to deliver an exemplification under the seal of a court to a jury, but not to deliver a document under a private seal, because the authenticity of the latter depended upon a collateral oath. Gil. L. E. 17, 18, 19. The common seal of the city of London proves itself. *Doe d. Woodmas v. Mason*, 1 Esp. 53. *Olive v. Gwyn*, 2 Siderf. 145; S. C. Hardres, 118; Anon. 9 Mod. 66; Sed vide *Moises v. Thornton*, 8 T. R. 303.

(*e*) 10 Co. 93, a.

quer (f), of a record of the great sessions in Wales, or in a county palatine, under the seal of the Court (g). Of the proceedings of the ecclesiastical courts (h). So is an exemplification of the pope's bull, under the seal of a bishop (i). Of the grant of administration with the will annexed, under the seal of the archbishop (k). So the exemplifications of the enrolment of a fine or recovery in Wales, and in the counties palatine, under the appropriate judicial seals, are evidence of such fines and recoveries (l).

Exemplification under the seal of the court.

But the mere production of an exemplification under the seal of an university is not evidence, without further proof that a party is entitled to his degree (m); neither is the exemplification of the judgment or decree of any foreign court admissible without proof of the seal of the court (n). But if a foreign court has an official seal, it ought to be used for the purpose of authenticating its judgments; and no copy by any officer of the court will be considered as of authority in this country (o).

Where the law entrusts a particular officer with the making of copies, it also gives credit to them in evidence without further proof, although a mere office copy by a person not so licensed is inadmissible (p). The chirograph of a fine is evidence of the fine itself, because the chirographer is an officer appointed by the law to make out such copies; but the chirograph is not evidence of the levying of a fine with proclamations, as the officer is not appointed to make copies of them (q). So a copy of a judgment made out, examined, and indorsed by the clerk of the court, is not in itself evidence, for he is entrusted as to the keeping only of records, and not with the making out copies of them (r). So where a deed enrolled is lost, a copy of the enrolment by the clerk of the peace is not admissible in evidence, for he is empowered merely to authenticate the deed itself by enrolment, and not to make out copies of the enrolment (s). The indorsement

Copies by authorized officers.

(f) *Tooker v. The Duke of Beaufort*, Say. 297.

(g) *Tooker v. Duke of Beaufort*, Say. 297; Hard. 120.

(h) 1 Ford's MSS. 166.

(i) Hard. 118.

(k) *Kempton v. Cross*, 8 G. 2, B. R. H. 108, although it merely recite the fact.

(l) By the stat. 27 Eliz. c. 9, s. 8, they are of as great force as the record. *Olive v. Gwyn*, 2 Sid. 145.

(m) *Henry v. Adey*, 3 East, 221. Vide *infra*, JUDGMENTS, PROOF OF.

(n) *Moises v. Thoratton*, 8 T. R. 303.

(o) *Black v. Lord Braybrooke*, 2 Starkie's C. 7; and *Appleton v. Lord Braybrooke*, *ibid*.

(p) Bac. Ab. Ev. F.; B. N. P. 229.

(q) B. N. P. 229, 230; Com. 409, b. Com. Dig. Ev. A (2). *Chettle v. Pound*, Trin. Ass. 1700; Bac. Ab. Ev. F. *Doe v. Bluck*, 6 Taunt. 486.

(r) Bac. Ab. Ev. 612, F.; B. N. P. 229.

(s) Bac. Ab. Ev. F.; and see *Appleton v. Lord Braybrooke*, 2 Starkie's C. 6; and *Black v. Lord Braybrooke*, 2 Starkie's C. 7; B. N. P. 229.

of the date of enrolment is conclusive evidence of the enrolment, for it is part of the record (*t*).

Proof by
office copy.

Office copies of judicial proceedings, that is, copies made by the known officers of the court, seem to be admissible for particular purposes in the same but not in other courts (*u*). With respect to causes depending in Chancery, it is said that office copies are the very records of the court, and prove themselves, and that no other copy can be produced therein (*x*); but such copies are not admissible in other courts (*y*).

Proof of
public doc-
ument by
a sworn
copy.

Thirdly, Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is to be considered as a deviation from the general rule, that the best evidence must always be produced, for the sake of public convenience. All judicial proceedings, whether in British or in foreign courts (*z*), may be proved by means of a sworn copy, although it be not an office copy (*a*); and whether the court be

(*t*) *The King in aid of Reed v. Jackson*, 3 Price, 495, in the case of an enrolment of a bargain and sale. So in cases of the enrolment of memorials of annuity deeds. *Garriek v. Williams*, 3 Taunt. 340. A memorandum of enrolment on a lease, on the margin of the lease, signed "A. B., Auditor," is sufficient proof that the lease has been enrolled with the auditor of the Duchy of Lancaster. *Kinnersly v. Orpe*, 1 Doug. 56.

(*u*) In general, an office copy is admissible in evidence in the same court and in the same cause, but not in a different cause, though in the same court. Per Lord Mansfield in *Denn v. Fulford*, Burr. 1177.

(*x*) *Denn v. Fulford*, Burr. 1177.

(*y*) Bl. 289. *Black v. Lord Braybrooke*, 2 Starkie's C. 7; and it is said to have been held *at nisi prius* that upon the trial of an issue out of Chancery, office copies of depositions in Chancery in the same cause were not receivable. *Barnard v. Kent*, 1 C. & P. 580; but see the opinion of Littledale, J. in *Highfield v. Peake*, M. & M. 111, vol. ii. tit. OFFICE COPY.

(*z*) *Appleton v. Lord Braybrooke*, 2 Starkie's C. 6; 6 M. & S. 34. In an action on judgments recovered in the

supreme court of Jamaica, the plaintiff produced merely paper writings, purporting to be copies of the judgments, subscribed "true copy," and signed "F. S. clerk;" to which were annexed several certificates: first, of F. S. under his hand and seal of office, certifying that the above were true copies of the original judgments of record in his office, and that the same were still unsatisfied; secondly, a certificate of R. R., described as secretary and notary public, certifying that F. S. was an accredited clerk, &c.; the third, from the Governor-general, under the seal of the island, certifying that R. R. was secretary, &c., and that to all acts, &c. signed by him, credit was to be given: the evidence was held to be insufficient, without proving the copies to have been actually examined; the seal of the island not being affixed to the copy to give it the force of an exemplification, but only to authenticate the person certifying to be a person to whom credit was to be given. So, where the copy was proved to be in the handwriting of one who acted and signed official documents for the principal clerk. *Black v. Lord Braybrooke*, 6 M. & S. 39; 2 Starkie's C. 7.

(*a*) *Denn v. Fulford*, Burr. 1177; Hard. 119; Gil. L. Ev. 9.

a court of record (*b*), or otherwise. The proceedings by English bill in Chancery are not records, and may themselves be given in evidence (*c*), or may be proved by means of examined copies (*d*). Sworn copy.

But upon an indictment for perjury, assigned upon an answer in Chancery, the original must be produced (*e*). And also, where a voluntary affidavit has been made by a party, which has no relation to a proceeding in a court of justice, to make it evidence against the party the original must be produced (*f*). Where a will remains in Chancery, by order of the court, a copy of it is evidence, because it becomes a roll of the court (*g*).

The copy must be one of a complete record, for until it become a permanent record it is transferable, and the reason for admitting a copy to be evidence does not apply (*h*). Consequently a sworn copy of a judgment in paper, although signed by the master, upon which judgment might be taken out, is not admissible (*i*). And to prove an interlocutory and final judgment and execution, an examined copy of the roll carried in must be proved; it is not sufficient to produce entries in the prothonotary's book, and the inquisition, with the prothonotary's allocatur (*k*). And, in general, a mere minute book of proceedings from which the record is subsequently to be made up is not admissible in evidence (*l*).

It is otherwise as to a matter which occurred before the same court sitting under the same commission. Upon the trial of Horne Tooke the minutes of the court were produced to prove the acquittal of Hardy (*m*).

The copy should be of the whole record, or of so much at least as concerns the matter in question (*n*).

A book published by authority in a foreign country as a regular copy of treaties concluded by the State, is not evidence without proving it to have been compared with the original archives (*o*).

It is a general rule, that whenever the original is of a public nature, a sworn copy is admissible in evidence. And that when- Sworn copy, when admissible.

(*b*) B. N. P. 226.

(*c*) Bac. Ab. Ev. 620.

(*d*) Bac. Ab. Ev. F. 623; 3 Mod. 116.

(*e*) Ibid.; for the identity of the defendant must be proved.

(*f*) *Chambers v. Robinson*, Trin. 12 Geo. 1; B. N. P. 238; Bac. Ab. Ev. 623.

(*g*) Keb. 40. 117; Gill. L. E. 276; Bac. Ab. Ev. F. 632.

(*h*) Bac. Ab. Ev. F. 610; B. N. P. 228. *Ayrey v. Davenport*, 2 N. R. 474.

(*i*) Ibid. So to prove a bill of indictment to have been found, it is necessary

to show a record with a complete caption. *R. v. Smith*, 8 B. & C. 341.

(*k*) *Godefroy v. Jay*, 3 C. & P. 192. The day-book kept at the office is not evidence of the date of signing judgment. *Lee v. Muroche*, 5 Esp. C. 177.

(*l*) *R. v. Smith*, 8 B. & C. 341. *Porter v. Cooper*, 6 C. & P. 354. *R. v. Belamy*, 1 Ry. & M. 366.

(*m*) *Howell's St. Tr.* vol. 25, p. 448.

(*n*) *Tri. P. P.* 166; 3 Inst. 173.

(*o*) *Richardson v. Anderson*, 1 Camp. C. 65.

Sworn
copy, when
admissible.

ever the thing to be proved would require no collateral proof upon its production, it is proveable by a copy (*p*). And that, where the document when produced would require support from collateral proof, a copy of it is not admissible. And therefore, where an application was made that an examination before a magistrate might be produced upon the trial of a cause, it was ordered, because the examination itself, if produced, would not in itself be evidence, without proof of the handwriting of the party (*q*).

Sworn copies of the following documents have been received in evidence:

Of a bank-note filed at the Bank (*r*).

Of transfer-books of the East India Company (*s*).

Of the books of the city of London (*t*).

Of court-rolls (*u*) under the hand of the steward.

Of the journals of both Houses of Parliament (*x*).

Of the minute-books of the House of Lords (*y*).

Of an agreement, from a book in the Bodleian library, from which books cannot be removed (*z*).

Of the probate of a will relating to personalty (*a*).

Of a parish-register (*b*).

Of a poll-book at an election (*c*).

Of a public book in one of the universities (*d*).

Of entries in the council-book in the secretary of state's office (*e*).

Of the enrolment-book in which leases are registered in the bishopric of Durham (*f*).

Of books of commissioners of excise (*g*).

(*p*) *Ld. Raym.* 154; *Str.* 126; 3 *Salk.* 153.

(*q*) *R. v. Smith*, *Str.* 126.

(*r*) *Man v. Cary*, 3 *Salk.* 155; 12 *Vin. Ab.* 97, 99. To prove a transfer of stock, a copy from the Bank books must be produced; the testimony of the broker who effected the transfer is insufficient. *Breton v. Cope*, *executor*, *Peake*, 30; and see *Douglas*, 572, n. 3. 593, n. Such copies are direct evidence; and the Court, for the sake of example, would not allow the books themselves to be read. *Marsh v. Collnett*, 2 *Esp.* 685.

(*s*) *Doug.* 572; 1 *Str.* 646.

(*t*) 2 *Str.* 954, 955.

(*u*) *Doug.* 572. 163; *Com.* 337; 12 *Mod.* 24.

(*x*) *Doug.* 593; *Cowp.* 17; *Str.* 126.

(*y*) 1 *Cowp.* 17.

(*z*) *Bun.** 191. *Downes v. Moreman*, 2 *Gwill.* 659; this, however, was considered as an indulgence under the particular circumstances of the case.

(*a*) 3 *Salk.* 154. *Hoe v. Nettlethorpe*, 1 *L. Raym.* 154.

(*b*) *May v. May*, 3 *Salk.* 154; *ib.* 281; 10 *State Tr.* 250; *Str.* 1073.

(*c*) *Mead v. Robinson*, *Willes*, 234.

(*d*) *Semble*, 8 *T. R.* 307.

(*e*) *Eyre v. Palsgrave*, 2 *Camp.* 606.

(*f*) *Humble v. Hunt*, *Holt's C.* 601.

(*g*) *Fuller v. Fitch*, *Carth.* 346.

Of books of assessments by commissioners of land-tax (*h*).

Although, for the sake of public convenience, the copy of a public document is admitted in evidence as an original, a copy of a copy is of no weight whatsoever, since it is one step farther removed from the original (*i*).

Sworn
copy, when
admissible.

The copy must be proved by one who swears that he has compared it with the original (*h*), taken from the proper place of deposit. It is sufficient for this purpose, either that the witness should have read the copy whilst another read the original, or *vice versâ* (*l*), for it will not be presumed that a person wilfully misread the record. And it is not necessary that the record should have been read by the officer of the court (*m*). Before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof (*n*).

How
proved.

A copy is never admissible where the original is produced (*o*). A copy of an entry in a *customal* being offered in evidence against a corporation, was rejected on production of the original (*p*).

Copy not
admissible
where the
original is
produced.

Where a record has been lost, a copy may in some instances be read in evidence without proof upon oath that it is a true copy (*q*). But to warrant such evidence the document must be according to the rule of civil law, *vetustate temporis aut judiciariâ cognitione roborata* (*r*). A copy of a decree of tithes has, it is said, been often given in evidence in London, without proving it to be a true copy, the original having been lost (*s*). So the exemplification of a recovery of lands in ancient demesne, where the original was lost, and possession had gone a long time with the recovery, was

Record, &c.
how proved
when lost.

(*h*) *R. v. King*, 2 T. R. 234.

(*i*) Gil. L. E. 9; and see Locke's Essay on the Understanding, 2d vol. 283.

(*k*) Bac. Ab. Ev. F.; Str. 401; L. Ev. 104; Mod. 4. 94. 144. 266; 2 Keb. 31. 546; 3 Keb. 1, 2. 477; 5 Mod. 211. 386; 6 Mod. 225. 248; 10 Co. 92.

(*l*) *Rolfe v. Dart*, 2 Tr. 52. *Gyles v. Hill*, 1 Camp. 469. *Tyson v. Kemp*, 6 C. & P. 72. *Reid v. Macquison*, 1 Camp. 469.

(*m*) *Eccles v. Hill*, 1 Camp. 409.

(*n*) *Adanthwaite v. Sings*, 1 Starkie's C. 183; 4 Camp. 372. In order to prove a copy of an Irish judgment, it was held to be insufficient for the witness to prove that

he compared the writing with a record produced to him in a room over the Four Courts, where the records of the superior courts are kept, without seeing whence the record was taken, or knowing the person who produced it to be an officer of the Court.

(*o*) 10 St. Tr. App. 137.

(*p*) Ibid.

(*q*) Vent. 257; Sty. Pr. Reg. 205; 1 Mod. 117; Salk. 285; Gilb. L. E. 89, pl. 18. Bac. Ab. Ev. F.

(*r*) Dig. 292; 1 Mod. 117.

(*s*) 1 Vent. 257; B. N. P. 228. See *Macdowgal v. Young*, Ry. & M. 393.

Record, &c.
how proved
when lost.

admitted in evidence (*t*). So, where it appeared that the records of the city of Bristol had been burned, an exemplification of a recovery, under the town-seal, of houses in Bristol, was allowed in evidence (*u*).

Upon an ejectment brought for the recovery of a rectory, to which a recusant had presented, it was held, that the record of the conviction, which had been burned, might be proved by estreats in the Exchequer (*x*), and an inquisition of the recusant's lands returned there. So, in trover, if a *feri facias* or *venditioni exponas* be lost (*y*), other evidence is admissible; so also if a recovery in ancient demesne be lost, and the roll cannot be found, it may be proved by the oral testimony of witnesses, where the possession has gone accordingly (*z*). So, where the question of appropriation is in issue, and the king's licence has been lost, the issue may be proved by other evidence (*a*).

Public documents
not judicial,
admissibility
of.

Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite

(*t*) In *Green v. Proud*, 1 Mod. 117, the exemplification of a recovery of lands in the Marquis of Winchester's court, in ancient demesne, was admitted in evidence, although it was not proved that it was a true copy. And the reason given was, because it was ancient; and Lord Hale said, that he recollected a case where one had got a presentation to the parsonage of Gosnall in Lincolnshire, and brought a *quare impedit*, and the defend-

ant pleaded an appropriation; there was no licence of appropriation produced, but the Court said they would intend it.

(*u*) 1 Mod. 117.

(*x*) *Knight v. Dauler*, Hard. 323; 1 Salk. 285.

(*y*) Hard. 323; Al. 18.

(*z*) 1 Vent. 257; 2 Str. 1129; 2 Burr. 1072; 4 T. R. 514.

(*a*) Hard. 323.

that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath; such, for example, as the passing of particular Acts of Parliament, and the making of public surveys (b).

Public documents not judicial, admissibility of.

The Acts of the Legislature are records written on the rolls of Parliament (c), and are of the highest and most absolute proof. They are either *public* or *private*. They are public or general Acts when they do or may concern the kingdom at large; they are private when they relate to a particular class of men, or to individuals only: of the former class, are Acts which concern the king, all lords of manors, or all officers generally, or all spiritual persons, all traders (d); of the latter, are Acts relating to the nobility only, or to particular persons or trades (e).

Acts of Parliament—public.

A *public* statute requires no proof; and where it is necessary to refer to one, a copy is not given in evidence, but merely referred to, as it were, to refresh the memory (f). Where a statute is not in express terms made a public statute, it is still such with a view to evidence, if it be of a general and public nature, affecting all the king's subjects; and therefore it has been ruled at the assizes, that a statute, as far as it related to a public highway, was to be consi-

(b) See further as to the principles on which public documents are admissible, *supra*, 225.

(c) See *Preface to the Statutes, by the Commissioners of Public Records*. The original of a public Act of Parliament is kept in the Parliament Office, and a transcript is engrossed and certified by a clerk in Parliament, and deposited in the Rolls Chapel. Private Acts are filed and labelled, and remain with the clerk of the Parliament, and are not (except a few of the earlier) deposited in the Rolls Chapel.

(d) It seems that the distinction between public and private Acts was not observed before the reign of Richard 3d. See preface to the new edition of the statutes at large.

(e) If a private statute be recognised by a public Act, it will afterwards be judicially noticed; as the statute of bailbonds, 23 H. 6, c. 9; which, at all events, became a public statute when the statute 4 & 5 Ann. c. 16, s. 20, made the bond assignable. *Samuel v. Evans*, 2 T. R. 575. *Saxby v. Kirkus*, B. N. P. 224.

(f) A printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. Gil. L. E. 12; 2 Salk. 566; 10 Mod. 126. 216; Bac. Ab. Ev. F. The Courts take notice of all public Acts of Parliament, and it is unnecessary to plead them; but private Acts must be specially pleaded. B. N. P. 152. *Lord Bernard v. Saul*, 1 Str. 498; Ld. Raym. 89. But although public Acts will be noticed by the Court when the party insists upon them by way of defence, the defence itself must be pleaded. As, where a defendant means to insist upon the statute of limitations, or the statute of usury, unless he plead the defence specially, he cannot rely upon the statute of limitations in evidence under the plea of the general issue in *assumpsit*, nor upon the statute of usury upon the plea of *non est factum* to a declaration upon a bond. B. N. P. 232. See tit. DEBT—DEED—PENAL ACTION—USURY—HIGHWAY.

Public Act
of Parlia-
ment.

dered as a public statute (*g*). So it is said that the Act of Bedford Levels, and that for rebuilding Tiverton, are, from the publicity of the subject-matter, public Acts; and that a printed copy may be given in evidence (*h*). On the other hand, an Act of Parliament, private in its nature, is not made admissible in evidence against strangers, by the general clause declaring it a public Act, which only applies to the forms of pleading, and does not vary the general nature and operation of the Act. A power in an Act to levy tolls on all persons using a particular navigation, is not sufficient to make it a public Act as against strangers (*i*).

Private Act
of Parlia-
ment.

Where an Act of Parliament is of a *private* nature, proof of it is necessary; for although every man is bound to take notice of all Acts which concern the kingdom at large, he is not presumed to be cognizant of those which merely concern the private rights of another (*h*). The usual proof is by means of a copy proved upon oath to have been examined with the parliament roll. It may also be proved by means of an exemplification under the great seal (*l*).

Act of Par-
liament,
how
proved.

In some cases it is directed, that a copy printed by the king's printer shall be admitted in evidence; and then the production of a copy purporting to have been so printed is sufficient (*m*).

(*g*) By *Chambre, J. MS. C.* But a private Act that concerned Rochester Bridge, though printed by Rastal, was not allowed in evidence. *L. E. 89, pl. 14, tam. qu.* A private inclosure Act, containing clauses respecting public highways, is, as to those clauses, a public Act. *R. v. Utterby, Lincoln Sp. Ass. 1828.* Lord C. B. Parker permitted the printed statute concerning the College of Physicians to be read from the printed statute-book, printed by the king's printer. *Gil. Law Ev. 10. 13.* See further, *Bac. Ab. St. T.* A very learned opinion given by Mr. J. Holroyd, when at the bar, that an Act of Parliament, although in other respects private, is, as regards a public highway to which it refers, to be considered a public Act, has in many instances been acted upon by magistrates at the sessions. In a late case, *R. v. Stonebeckup, York Summer Ass. 1839*, on an indictment for obstructing a public way, Maule, B., received an award under a local inclosure Act, in evidence, so far as regarded a public highway, set out under the award.

(*h*) *B. N. P. 225*, per Holt, C. J.; 12 *Mod. 216.* See Pothier by Evans, vol. 2, p. 152.

(*i*) *Brett v. Beales, 1 M. & M. 417.*

(*k*) *Bac. Ab. Ev. F.; Gil. L. Ev. 13.* See the case of *The College of Physicians v. West, 10 Mod. 353*, cited *supra*, note (*g*), and the cases there cited.

(*l*) See tit. EXEMPLIFICATION.

(*m*) Upon *nul tiel* record, pleaded to the Composition Act, Holt, C. J. held, that a copy printed by the king's printer was not sufficient, and that an exemplification was necessary; but said, that an Act printed by the king's printer was always good evidence before a jury. *Anon. 2 Salk. 566.* Where an indictment set out the title of an old statute (5 *Eliz. cap. 4*), agreeably to Ruffhead, which differed from a copy of the Act lately printed by the king's printer, the Court refused to direct an acquittal without proof of an examination of the parliament roll. *Rex v. Barnitt, 3 Camp. 344.* *Cor. Ellenborough, C. J. 1813.*

But where an Act of a private nature is declared to be a public Act, and required to be judicially noticed, it is unnecessary to prove an examined copy (*n*). Act of Parliament, how proved.

Where a party appealed against an act done by another under a private statute, it was held that the appellant was not bound to prove an examined copy of the roll, and that a printed copy was sufficient (*o*).

Where the printed copy of an Act is incorrect, the Court will be guided by the parliament roll (*p*).

By the statute 41 Geo. 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received (mutually) as conclusive evidence of the several statutes in the courts of either kingdom. Irish statutes.

The recital in the preamble of a public Act of Parliament of a public fact, is evidence to prove the existence of that fact. Where an information for a libel alleged that outrages had been committed in particular parts of the kingdom, the preamble of a public Act reciting the fact was held to be admissible evidence to support the averment; for every subject is, in contemplation of law, privy to the making of such an Act (*q*). Recitals in Acts of Parliament.

Acts of state may be proved by a production of the official printed document authorized by Government. The Gazette (*r*) is evidence of all acts of state, and of everything done by the king in his regal capacity, as to prove an averment that divers addresses had been presented to the king (*s*); for having been received by the king in his public capacity, they become acts of state. So the Gazette is evidence to prove the king's *proclamation*, as for performance of quarantine. So the printed proclamation of peace is evidence, Acts of state—Gazette.

(*n*) *Beaumont v. Mountain*, 10 Bing. 404. *Woodward v. Cotton*, C. M. & R. 44.

(*o*) *R. v. Shaw*, 12 East, 479.

(*p*) See *R. v. Jefferies*, 1 Str. 446. *Spring v. Eve*, 2 Mod. 240. *Price v. Hollis*, 1 M. & S. 105.

(*q*) *R. v. Sutton*, 4 M. & S. 532. And see *R. v. De Berenger*, 3 M. & S. 67. It is otherwise as to recitals in private Acts, per Alderson, B., 1 C. M. & R. 47.

(*r*) A gazette purporting to be printed by the King's printer, must be taken to be the London Gazette. *R. v. Holt*, 5 T. R. 439.

(*s*) *R. v. Holt*, 5 T. R. 436. The king's proclamation is not noticed by the Court without the production of the Gazette.

Van Omeron v. Dowick, 2 Camp. 44; 12 Vin. Ab. 120; *Dupays v. Shepherd*, 12 Mod. 216. In a prosecution for murder, the articles of war ought to be produced to show how far the prisoner was bound to obedience to the deceased, who was his serjeant. Ibid. In the case of the *Attorney-General v. Theakstone*, 3 Price, 80, it was held that the Gazette was sufficient evidence of a proclamation issued by the council, because it is a public Act regarding the Crown and the government, and must pass the great seal before it can be admitted into the Gazette. In *General Picton's Case*, Howell's St. Tr. 493, the Gazette was admitted to prove the articles of capitulation for the surrender of an island.

Gazette.

without examination with the parliament roll (*t*). And it was held, that a proclamation for the discovery of certain offenders, which recited that outrages had been committed in certain districts, was evidence to satisfy an averment, in an information for a libel, that such outrages had been so committed (*u*). So the articles of war, published by the king's printer, are evidence of such articles (*x*). The proclamation for reprisals in the Gazette is evidence of an existing war (*y*).

It seems; however, that knowledge of a fact, although it be of a public nature, is not to be conclusively inferred from a notification in the Gazette (*z*); it is a question of fact for the jury.

But the Gazette is not evidence to prove a particular military appointment (*a*), nor to prove particular facts between individuals, and therefore it is not evidence in an action to prove the appointment of one of the parties to a commission in the army, unless (at least) the adversary refuse to produce the commission, which is the best evidence (*b*). But it is evidence, as a medium to prove notices; as of the dissolution of a partnership, which is a fact usually notified in that manner (*c*). But without proof that the party to be affected by the notice read the particular Gazette in which it is contained, such evidence is very weak (*d*). And it seems to be incumbent on those who dissolve partnership to give special notice of it to those with whom they have had dealings (*e*). Notices of bankruptcies in Gazettes are made sufficient by express legislative provisions. It is unnecessary to give any evidence to authenticate the Gazette produced, or show whence it came (*f*).

(*t*) Bac. Ab. Ev. F. Doug. 594, in n. B. N. P. 226. Ca. K. B. 216. *Quelch's Case*, 8 State Tr. 212.

(*u*) *R. v. Sutton*, 4 M. & S. 546.

(*x*) *R. v. Withers*, cited by Buller, J. 5 T. R. 546, as the opinion of the Judges. See above, note (*s*).

(*y*) *R. v. Holt*, 5 T. R. 443. Public notoriety is, it is said, sufficient evidence of the existence of a war. Fost. C. L. 219. See *R. v. Berenger*, 3 M. & S. 67, and 11 Ves. 292. And a declaration of war by a foreign government, transmitted by the English ambassador, and produced from the secretary of state's office, is evidence of the commencement of war with a foreign state. *Theilussou v. Gosting*, 4 Esp. C. 266; and see 1 Dodson Ad. R. 244. Documents transmitted by British consuls, stating the arrival of vessels at particular

ports, are not evidence. *Roberts, et al. v. Eddington*, 4 Esp. C. 88. And see *Waldron v. Coombe*, 3 Taunt. 162.

(*z*) *Harratt v. Wise*, 9 B. & C. 712.

(*a*) *R. v. Gardner*, 2 Camp. 513.

(*b*) *Kirwan v. Cockburn*, 5 Esp. 233. *S. P. R. v. Gardner*, 2 Camp. 513.

(*c*) *Leeson v. Holt*, 1 Starkie's C. 186. *Graham v. Hope*, Peake's C. 154. *Godfrey v. Macauley*, Peake's C. 155, n. *Gorham v. Thompson*, Peake's C. 42.

(*d*) *Leeson v. Holt*, 1 Starkie's C. 186. See PARTNERSHIP. And see *Graham v. Hope*, Peake's C. 154. *Mann v. Baker*, 2 Starkie's C. 255. *Gorham v. Thompson*, Peake's C. 42.

(*e*) 1 Esp. C. 171. *Gorham v. Thompson*, Peake's C. 42. *Jenkins v. Blizard*, 1 Starkie's C. 418.

(*f*) *R. v. Forsyth*, Russ. & R. 274.

Journals of
the Lords
and Com-
mons.

The journals of the House of Lords have always been admitted as evidence of their proceedings even in criminal cases (*g*); and the journals of the House of Commons are also admissible for the same purpose, but this was once doubted, because they are not records (*h*). An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal (*i*). The journals of the House of Lords are evidence to prove an address of the house to the king, and his answer (*k*), in order to support an averment in an information, that certain differences had existed between the king of England and the king of Spain. But the journals are not evidence of particular facts stated in the resolutions, which are not a part of the *proceedings*, of the house. Upon the indictment of Oates for perjury, a resolution of the House of Commons of the existence of a popish plot was rejected as evidence of the fact (*l*). In Knollys's case it was held, that, upon a plea in abatement that the party was a peer, a replication was bad, which alleged that the peerage had been disallowed by the Lords (*m*).

Public
Acts of the
Crown.

All public acts done by the Crown affecting the possessions and revenues of the Crown, are to be considered as public Acts, and are admissible in evidence as such. An enrolment of a lease of lands belonging to the Crown in right of the duchy of Lancaster is admissible (*n*), on account of the interest of the Crown in the Duchy of Cornwall and its revenues.

A caption of seisin taken to the use of the first Duke by persons assigned by his letters patent for that purpose, was held admissible as a public Act in evidence to show the rights of the duchy (*o*).

A book in which leases were enrolled and kept in the custody of the auditor of the bishop of Durham (who is a patent officer within the county palatine), is a public muniment. And there-

(*g*) See *Jones v. Randall*, Cowp. 17.
R. v. Lord George Gordon, Doug. 593.
Lord Melville's Case, 24 Howell's St. Tr. 683.

(*h*) *Ibid*.

(*i*) *Ibid*.

(*k*) *Franklin's Case*, 9 State Tr. 259,
cited by Buller, J. 5 T. R. 465. And see
4 State Tr. 376. 445; Doug. 572.

(*l*) *R. v. Oates*, 4 State Tr. 30; 10
Howell, 1165.

(*m*) 2 Salk. 600.

(*n*) *Kinnersley v. Orpe*, Doug. 56.

(*o*) *Rowe v. Brenton*, 8 B. & C. 743.
And the same rules are applicable whether
the lands and revenues are at any parti-
cular time vested in the Duke of Cornwall
or the King. Held, therefore, that as the
enrolment of a lease in the duchy office
would be good evidence of a lease if the
Crown alone were interested, it was equally
so in the case of a lease by the Duke.
Ibid. 756.

fore where search had been ineffectually made for an original lease, and the counterpart to a lessee under the bishop, it was held that such book was admissible as secondary evidence of such lease (*p*).

Ancient
surveys
under au-
thority.

Surveys, taken under authority, are also evidence. *Domesday-book* was a survey made of the king's lands in the time of William the Conqueror (*q*); and when a question arises whether a particular manor be of ancient demesne or not, that is, of the socage tenures which were in the hands of Edward the Confessor, the trial is by inspection of *Domesday-book*, which is preserved in the Exchequer (*r*). Frequent changes in the names of places render evidence for the purpose of identification very important (*s*). It has been held that a variance between the modern name and that contained in *Domesday* ought to be averred on the record (*t*). This ancient survey seems to be generally admissible as to all matters which it contains in respect of manors, and as to ancient local divisions or boundaries, the tenure or occupation of manors, lands, or mills; as also to matters of pedigree, and other immemorial rights or circumstances which are the subject of proof.

In the Exchequer also is another ancient survey, which ascertains the extent of the king's ports (*u*).

The *valor beneficiorum*, a valuation of the profits of spiritual

(*p*) *Humble v. Hunt*, Holt's C. 601. A book produced from the chapter-house of the dean, &c. of S., kept by the chapter-clerk, and purporting to contain copies of leases, &c. granted by the dean, &c. held to be in the nature of a public document, and admitted in evidence to prove reputation as to boundary of a parish. *Coombs v. Wether*, 1 M. & M. 398. And see *Humble v. Hunt*, above cited.

(*q*) The public in general, and the legal profession more especially, are greatly indebted to Sir H. Ellis for his most valuable and instructive work on *Domesday*; a record in which the lawyer, the antiquary, and the historian possess one common interest. Some curious particulars connected with the compilation of *Domesday* are to be found in Ingulphus's *History of Croyland*. Ingulphus, the abbot, and learned historian of his own abbey, and the early friend of William the Conqueror, relates, with satisfaction, that the possessions of the abbey were underrated; and his statement fairly affords the inference that this

was not a solitary instance of the kind. A tax, or census, proportioned to the possessor's revenues, would probably be suspected as one motive for compiling such a document.

(*r*) Hob. 188; Gil. Ev. 78, 2d ed. Trial per Pais, 342; Bac. Ab. Ev. 633. A very faithful copy of this document has lately been printed by Government.

(*s*) See an instance cited, 1 Phill. Ev. 580, 7th ed., where the manor of Bugden was identified with that of Bugedine, in *Domesday*, by means of old deeds. In the case of *Alcocke v. Cooke*, cited ib., the question turned on what, according to the correct mode of reading *Domesday*, was parcel of the manor of Grantham, and whether the effect of a red line drawn through the words "Hythe Wapentake," denoted an error, or was for the purpose of drawing attention.

(*t*) *Gregory v. Williams*, 28 C. 2; Gil. Ev. 44; 3 Keb. 588; *infra*, tit. VARIANCE.

(*u*) Gil. Ev. 78; Bac. Ab. Ev. F.

preferment, made under a commission from pope Nicholas III., and completed A.D. 1292, and known also by the title of Pope Nicholas's Taxation, is still preserved in the Exchequer, in the office of the king's remembrancer. In applying the restrictive clause in the statute 21 Hen. 8, concerning pluralities, and the exemptions from it, to college livings, their value is ascertained by this survey (*x*). When the first fruits and tenths, on the abolition of the papal power, were annexed to the Crown, a new *valor beneficiorum* was made, by which the clergy are at present rated (*y*). This valuation was made by commissioners under the great seal, who, in executing this duty, seem to have calculated the value of the first fruits and tenths, without regarding any modus or other legal exemption. A survey, dated 1563, from the First-fruits Office, of the possessions of the nunnery of St. Mary without the walls of York, was admitted to prove a vicar's right to certain tithes, although the original commission was lost (*z*). Parliamentary surveys under the Commonwealth are also admissible (*a*); and where the originals have been lost, as many were at the time of the great fire of London, copies of them, taken from unsuspected repositories, have also been admitted (*b*). So great is the reputed accuracy of these surveys, that their silence as to an alleged modus has been considered to be strong evidence against its existence (*c*).

Ancient surveys under authority.

Another ancient record is the *inquisitiones nonarum*, which was taken in the reign of Ed. 3, by commissioners under the great seal, upon the oath of the parishioners in every parish, in order to ascertain the value of the ninth of corn, wool, and lambs in every parish, a grant having been made by Parliament in the 14th year of the reign of that sovereign (*d*).

On the same ground an inquisition taken in 1730, by the direc-

(*x*) 2 Lut. 1305. *Humphries v. Knight*, Cro. Car. 445. *Stamp v. Ayliffe*, 2 Gwill. 536. See the First Report of the House of Commons on Public Records. This taxation is evidence of the value at which those employed to make it estimated the living. See *Bullen v. Michell*, 2 Price, 477. And all taxes due to the king, as well as the pope, were regulated by it. As to the effect of this and other such surveys, and also as to ministers' accounts, see Vol. II. tit. TITHES.

(*y*) 1 Comm. 285. This *valor beneficiorum* is commonly called the *king's books*, a transcript of which is given in Bacon's *Liber Regis*, and in Ecton's *Thesaurus*.

(*z*) *Kellington v. Master, &c. of Trinity*

College, Cambridge, 1 Wils. 170. *Underhill v. Durham*, 2 Gwill. 542.

(*a*) *Blundell v. Thompson*, 1 M. & S. 292.

(*b*) *Underhill v. Durham*, 2 Gwill. 542; 4 Dow, 325. *Green v. Proude*, 1 Mod. 117. See further as to these, Vol. II.

(*c*) 1 M. & S. 292; 11 East, 284.

(*d*) The commissioners were to levy the ninth in every parish, according to the rate at which churches were taxed, (viz. by Pope Nicholas's Taxation,) if the value of the ninth amounted to so much, but if not, then only according to the true value. See the Report of the Commissioners of Public Records, App. L. 2, p. 146. As to ministers' accounts of monasteries, see Vol. II.

Ancient
surveys un-
der autho-
rity.

tion of the House of Commons, has been received as conclusive evidence of the tenure and fees of the different offices to which it relates (e). And, as it seems, upon the same principle, inquisitions under public commissions, but of limited extent, have also been received, as in the case of *Tooker v. The Duke of Beaufort* (f), where it was held that a return to a commission out of the Exchequer, in the reign of Elizabeth, to inquire whether the prior of St. Swithin, or the Crown, after the dissolution of the priory, were seised of certain lands, was evidence. So in the case of *Doe v. Harcourt* (g), it was held that a survey of lands, belonging to the prebend of the Moor of St. Paul's, was admissible evidence against the lessees of the prebendary.

An ancient extent of crown lands, produced from the proper place of deposit (the lord treasurer's remembrancer's office), purporting to have been taken by the steward of the king's lands, and following in its construction the stat. 4 Edw. 1, was held to be admissible, on the presumption that it had been taken under proper authority, although the commission could not be found (h).

Inquisi-
tions post
mortem.

Inquisitions *post mortem* appear originally to have been taken before justices in eyre upon the deaths of the king's tenants *in capite* (i). The st. 1 H. 8, c. 8, enacts, that these shall be taken on the oaths of twelve men, and in open places. These were afterwards placed under the jurisdiction of the Court of Wards and Liveries, erected in the 32d & 33d years of H. 8. Upon the abolition of this court, together with the military tenures from which they sprung, the practice of taking such inquisitions ceased.

Such inquisitions thus made under authority are admissible, and are most important (k), although not conclusive evidence (l) of their contents.

And where the proceedings appear to have been irregular such inquisitions are not receivable in evidence (m).

Terriers.

Similar to these in their nature, but differing in point of authority, are old terriers, or surveys, whether ecclesiastical or temporal,

(e) *Green v. Hewitt*, Peake's C. 182; Peake's Ev. 87, 3d ed.

(f) Burr. 148.

(g) Peake's Ev. 84.

(h) *Rowe v. Brenton*, 8 B. & C. 747.

(i) See 2 Bl. Comm. 68. Vol. II. tit. PEDIGREE.

(k) Lord Mansfield observed (in *Birt v. Barlow*, Dav. 171,) that it is easier to establish a pedigree for five centuries be-

fore the time of Charles the Second, than for one century afterwards.

(l) Per Lord Hardwicke, in *Serjeantson v. Sealy*, 2 Atk. 412. *Lord Thanet v. Forster*, Jones, 224. And see the observations of Bayley, B., in *Bree v. Beck*, 1 C. & J. 367.

(m) See Cruise on Dignities, c. 6, s. 60, and Vol. II. tit. PEDIGREE.

which are admissible to prove old tenures or boundaries (*n*). Such boundaries are artificial and arbitrary, and cannot be established by the testimony of eye-witnesses; in such cases, therefore, unless surveys of antiquity and of authority were admissible, all evidence would frequently be excluded. It is however necessary to clothe such evidence with *some authority*, in order to distinguish it from the mere inaccurate description made by a stranger (*o*) for purposes unknown. Ecclesiastical terriers, which contain a detail of the temporal possessions of the church in every parish, are made by virtue of an ecclesiastical canon (*p*), which directs them to be kept in the bishop's registry (*q*), or the registry of the archdeacon of the diocese (*r*), and it is not unusual to deposit a copy in the chest of the parish church (*s*). These being made under authority are admissible evidence as a species of ecclesiastical memorials or records of the possessions of the church, and are as strong in their nature as any that can be adduced for such purposes (*t*).

Proof as to
place of
deposit.

It is, in general, essential to the reception of ancient instruments of this kind, and indeed of all others, whether they be of a public or private nature, such as public surveys, inquisitions, or ancient deeds, that the authority of the document should be established by the only kind of proof of which it is in general capable; that is, by proof that it came out of the proper repository. A document, purporting to be an endowment by a bishop, but without his seal, and an *inspeximus* of the bishop under his seal, were rejected, because they came out of the hands of a mere private person (*u*). In the case of *Michell v. Rabbetts* (*v*), it was held that an ancient grant to an abbey, in a manuscript, entitled "*Secretum Abbatis*," kept in the Bodleian library at Oxford, was inadmissible, for want of proof of proper custody. On this authority also, it was held, by Lawrence, J. that an ancient grant to a priory, found amongst the Cottonian Manuscripts in the British Museum, without proof of connection between the

(*n*) B. N. P. 248; Bac. Ab. Ev. F. Gil. Ev. 78, 79. *Chapman v. Cowlan*, 13 East, 10. An unsigned map, or terrier, is not evidence. *Earl, clerk, v. Lewis*, 4 Esp. C. 1. Though it purport to have been taken by competent authority, and have been generally received as authentic. *Pollard v. Scott*, Peake, 18, cor. Lord Kenyon. And see *Athins v. Watson*, 2 Anst. 386. *Lygon v. Strutt*, ib. 601.

(*o*) See the principle, *supra*, 225.

(*p*) 87th.

(*q*) *Athins v. Hatton*, 4 Gwill. 1406; 2 Anst. 386. *Pulley v. Holton*, 12 Price, 625.

(*r*) *Potts v. Durant*, 4 Gwill. 1450.

(*s*) *Armstrong v. Hewett*, 4 Price, 218.

(*t*) 3 Price, 380.

(*u*) *Potts v. Durant*, 4 Gwill. 1453.

(*v*) Cited 3 Taunt. 91.

Proof as to
place of
deposit.

possession of the grant, and an interest in the estate (x), could not be received in evidence.

It is not essential to the admissibility of evidence of this nature that the inquiry should have been made by means of witnesses examined on oath, it is sufficient that it was made by virtue of competent authority on behalf of the public, and on a subject-matter of public interest.

It is, however, of the very essence of evidence of this nature that the inquiry should have been made under proper authority; in general, therefore, unless the authority be in its nature notorious it must be proved by the production of the commission, as in the case of an inquisition *post mortem*, and such private offices (y). And in other cases, where it may be presumed that the commission under which the depositions were taken has been lost, they may be read without its production (z). And in cases of general concern, such as the ministers' returns to the commission in Henry the Eighth's time, to inquire into the value of livings, the party is not bound to give in proof the commission (a), and it would be attended with great inconvenience and expense to oblige parties to take copies of the whole record. Where an inquisition has been taken without legal authority it is inadmissible (b).

Papers delivered by the son of a deceased rector to the successor's attorney, as old parish documents, are sufficiently identified by the attorney, without calling the son (c).

An ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 Ed. 1, will be presumed to have been taken under proper authority, although the original commission cannot be found (d).

To show the authenticity of ecclesiastical terriers, it must be proved that they were found in the proper repository, the bishop's registry, or that of the archdeacon of the diocese (e); or proof must be given to establish a connection between the terrier and the place in which it was found. As against a prebendary of Lichfield, a terrier found in the registry of the dean and chapter of

(x) *Swinerton v. Marquis of Stafford*, 3 Taunt. 91. *Earl v. Lewis*, 4 Esp. C. 1. So it must be proved that records, when produced, came out of the proper custody. 1 Starkie's C. 193.

(y) B. N. P. 228.

(z) *Bayley v. Wylie*, 6 Esp. C. 85.

(a) *Bayley v. Wylie*, 6 Esp. C. 85. *Vicar of Killington v. Trinity College*, 2 Wils. 170.

(b) See below, *Lathow v. Eamer*, 2 H. B. 437. *Glossop v. Poole*, 3 M. & S. 175.

(c) *Earl v. Lewis*, 4 Esp. C. 1.

(d) *Rowe v. Brenton*, 8 B. & C. 737.

(e) *Atkins v. Hutton*, 2 Anstr. 386. *Miller v. Foster*, *ibid.* 387, in not. 4 Gwill. 1406. 1593.

Lichfield was held to be admissible (*f*), on the ground that the terrier was sufficiently connected with the place in which it was found, and because it was found annexed to an old and nearly cotemporary lease (*g*). One found in the charter-chest of Trinity-college, Cambridge, which had property in the parish, was held to be inadmissible (*h*). Terriers are admissible not only in suits between landowners on one side and the parson on the other, but also in suits between a vicar and impropriator (*i*). A terrier is *always* strong evidence *against* the parson, but not for him, unless it has been signed by the churchwardens also, or (if they be nominated by him) by some of the substantial inhabitants, without which it deserves (it is said) little credit (*j*). A terrier imperfect, because it has not been signed by the vicar, is still admissible (*k*). But a terrier from the custody of a person who was the owner of the tithes of a district of the parish, has been held to be admissible (*l*). Upon a question of title between the vicar and rector, a terrier, signed by the churchwardens, but not by the vicar, was held to be not only admissible, but to be even stronger evidence for the successor than if it had been signed by the vicar for the time being; and it was held to be no objection, that it was not signed by any one who claimed under the rector (*m*). Old terriers, signed by the rector, churchwardens, overseers, and some of the resident parishioners, were held to be good evidence for the rector, to rebut the presumption of a *farm-modus* which was attempted to be established, although such terriers were not proved to have been signed by any person interested in the farm (*n*).

Proof as to
place of
deposit.

The king's sign-manual, authorizing the release of a prisoner, is evidence to prove the legality of his being at large (*o*). But, in

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(*f*) *Miller v. Foster*, 2 Anstr. 387, in note.

(*g*) 4 Gwill. 1453.

(*h*) *Atkins v. Hatton*, 2 Anstr. 386; 4 Gwill. 1406.

(*i*) *Illingworth v. Leigh*, 4 Gwill. 1615. *Potts v. Durant*, 3 Anst. 796. As to the effect of terriers in evidence, see *Atkins v. Drake*, McClellan & Y. 214. *Lake v. Skinner*, 1 J. & W. 9. *Stuart v. Greenall*, 9 Price, 113. Vol. II. tit. TITHES.

(*j*) B. N. P. 248. *Earl v. Lewis*, 4 Esp. C. 1.

(*k*) 4 Gwill. 1615.

(*l*) *Tucker v. Wilkins*, 4 Simons, 241.

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It is otherwise where the possession is *merely* private, and unconnected with the subject-matter. *Potts v. Durant*, 4 Gwill. 1450.

(*m*) *Illingworth v. Leigh*, 4 Gwill. 1615.

(*n*) *Mytton v. Harris*, 3 Price, 19. Wood, B. *dissentiente*. He agreed that, as to such terriers as affected the parish generally, it would be sufficient if they were signed by any of the parishioners; but held that their signing a terrier would not make it admissible to affect a *farm-modus*.

(*o*) *Miller's Case*, Leach, C. C. L. 3d ed. 60.

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licenses—
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certificates.

general, the certificate by the king of a matter of fact under his sign-manual is not admissible in evidence (*p*).

The license of the pope, during his supremacy in this kingdom, is evidence of an impropriation (*q*). So his bull has been admitted to show that lands belonging to a monastery were discharged of tithes at the time of the dissolution (*r*). But it is said that a copy of a bull is not evidence (*s*). So an endowment by a bishop, under his seal (*t*), would be evidence, if derived from the proper custody.

Certifi-
cates.*

Certificates, and other documents made by persons entrusted with authority for the purpose, may also be considered as public documents, and they are evidence against all, to the extent of the officer's authority, of the facts which he is directed to certify. For where the law has appointed a person to act for a specific purpose, the law must trust him as far as he acts under its authority (*u*). Therefore the indorsement of the officer upon a deed of bargain and sale is evidence of its enrolment (*x*). The chirograph of a fine is evidence of the fine, because the officer is appointed to give out copies of the agreements between the parties that are lodged of record. Wherever it is an essential part of the officer's duty to deliver out copies of a record, such copies are evidence (*y*). Where a court has, for its own convenience, appointed officers to make out copies, such copies are evidence in that court, without further proof, but not elsewhere. An office copy of depositions is admissible in equity, without examination with the roll, but is not receivable in a court of law (*z*). By the 7 & 8 Will. 3, c. 7, s. 5, the entry in the book kept by the clerk of the Crown for entering returns, alterations, and amendments, or a copy of so much as relates to the return, is made evidence in an action for a false or double return. So by many other statutes, authorized entries and documents, which will be noticed in their proper places, are made evidence (*a*).

(*p*) By Willes, L. C. J. in *Omichund v. Barker*, Willes, 550; 2 Roll. Ab. 686, H. Although in one old case such evidence was admitted, no exception being taken. *Abignye v. Clifton*, Hob. 213.

(*q*) *Cope v. Bedford*, Palm. 427; Gil. Ev. 6; Bac. Ab. Ev. F.

(*r*) *Lord Clanricarde's Case*, Pal. 38.

(*s*) *Brett v. Ward*, Winch. 70. But qu.

(*t*) *Potts v. Durant*, 4 Gwill. 1453.

* See further, as to certificates, Vol. II. tit. CERTIFICATE.

(*u*) B. N. P. 229.

(*x*) *Kinnersley v. Orpe*, Doug. 57.

(*y*) See *Black v. Lord Braybrooke*, 2 Starkie's C. 7. 13; and see below, tit. JUDGMENTS—JUDICIAL DOCUMENTS.

(*z*) B. N. P. 229. *Black v. Lord Braybrooke*, 2 Starkie's C. 6. *Barnard v. Newot*, 1 Carr. & P. C. 578.

(*a*) See 3 W. & M. c. 9, s. 7, as to examination under Mutiny Act. Where upon a question as to the delivery of a cask of whiskey, the Court below had decided upon the effect of extracts from the excise books, and the certificate of a commissioner

Public registers, although not originally intended for the purposes of evidence, are generally admissible in support of the facts to which they relate, for they are made by persons in an official situation, whose duty it is to make the entries accurately of the facts immediately within their knowledge. These are, the *registers* (b) kept in churches, of *baptisms*, *marriages*, and *burials* (c). Although the entries are first made in a day-book, such day-book is not evidence when the entry has been made in the register (d). And therefore, where in the day-book the letters B B were added, which were explained to mean base-born, but were not added in the subsequent entry in the register, the Court held that the entry in the register could not be controlled or altered by the entry in the day-book, for there could not be two registers in the same parish (e). An entry in the register of baptism by a minister, of the baptism of a child which had taken place before he became minister, and made on the information of the clerk, is not admis-

Public registers of a parish.

of excise, as to the accuracy of the books from which such extracts were taken, the House of Lords reversed the judgment, as having been decided upon inadmissible evidence. Excise books, as public documents, might be received; or if on account of public convenience the originals could not be produced, examined copies on oath might be produced. *Dunbar v. Harvie*, 2 Bli. 351.

(b) These were originally instituted at the instigation of Lord Cromwell, who (temp. H. 8.) was Vicar-general to the King, and before whom all wills to the value of 200 l. were to be proved. This appointment was afterwards confirmed by the injunction of Edward 6th, who directed that the registering should be in the presence of the parson and churchwardens, on a Sunday, and that the book should be kept locked in the church, the vicar and churchwardens having keys. See Salk. 281; Gil. Ev. 76. See also the Marriage Act, 26 Geo. 2, c. 33, s. 14, which directs that immediately after the celebration of every marriage, an entry thereof shall be made in such register, in which it shall be expressed that the marriage was celebrated by banns or license; and if both or either of the parties married by license be under age, with consent of parents or guardians, as the case shall be; and shall be signed

by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses. By the stat. 52 Geo. 3, c. 146, s. 7, copies of registers verified by the officiating minister of the parish shall be transmitted annually by the churchwardens, after they, or one of them, shall have signed the same, to the registrars of the diocese. Provisions of a similar nature had been made by the canons of 1603, but these prescriptions had fallen into disuse. See the provisions of the recent stat. 6 & 7 Will. 4, c. 86. See Burn's Ecc. Law, 295; Gibson's Codex, 204; and Vol. II. tit. MARRIAGE.

(c) Sid. 71; Godb. 145.

(d) *May v. May*, Str. 1073; per Probyn and Lee, Js., Page, J. *dissentiente*. See *Walker v. Wingfield*, 18 Ves. 443.

(e) *May v. May*, Str. 1073. See *Lee v. Meacock*, 5 Esp. C. 177. If the entry in the day-book, which represented the plaintiff to be illegitimate, had been made under the direction of the reputed father and mother the evidence would, it seems, have been admissible as the declaration of a deceased parent. In the absence of such evidence, it appeared to be nothing more than a private memorandum, made for the purpose of assisting the clerk to make up the register.

Public registers of a parish.

sible evidence, neither is the private memorandum of the clerk, who was present at the baptism (*f*).

The books of the Fleet prison are not, it is said, admissible in evidence to prove a marriage, for they are not made under public authority (*g*). Nor is the copy of a register of a foreign chapel admissible here to prove a marriage abroad (*h*). Neither is the copy of a register of baptism in Guernsey (*i*); nor the register of a dissenting chapel (*k*).

An entry in a register, like any other public document, may be proved by means of an examined copy (*l*); and it is of course unnecessary to give any proof by means of the subscribing witnesses, or to prove their handwriting (*m*), although the register be produced (*n*). A register is evidence, even between strangers, as to the time of marriage (*o*). And a statement in the register that a child was base born has been received in evidence (*p*). The regis-

(*f*) *Doe v. Bray*, 8 B. & C. 813.

(*g*) *Reed v. Passer*, Peake's C. 231. *Doc d. Orrell v. Madox*; *Haywood v. Firmin*, Peake's C. 233. *Howard v. Burtonwood*, ib. (*n*). *Cooke v. Loyd*, ib. But semble, that on a question of pedigree, the books of the Fleet are evidence to show the name by which a woman passed when she was married there. *Lawrence and others v. Dixon*, Peake, 136; 1 Esp. 213. And in *Doe v. Lloyd*, Shrewsb. Summer Ass., Heath, J. admitted them in evidence. See Peake's Ev. 87. These books are said to have been purchased by Government, and to be deposited in the Consistory Court of London. They contain the original entries of marriages solemnized in the Fleet prison from 1686 to 1754. Phillips on Ev. Vol. I. p. 595, 6th ed.

(*h*) *Leader v. Barry*, 1 Esp. 353. *Whitehead v. Wynn*, 1 Jac. & Walk. 483. See further, Vol. II. tit. MARRIAGE.

(*i*) *Huet v. Le Mesurier*, 1 Cox. Cas. 175.

(*k*) For it is not a public document. *Newham v. Raithby*, Phillimore, 315. A register of baptism of the child of a dissenter (twenty-five years after the alleged birth), containing the words "said to be born," &c. being mere hearsay and information, and therefore of no assistance

in establishing the fact, was refused to be allowed to remain as a part of the proceedings. *Duins v. Donovan*, 3 Hagg. 301. —An entry of the birth of a dissenter's child, in a book kept at Dr. Williams's Library in Redcross-street, was held to be inadmissible evidence. *Ex parte Taylor*, 1 J. & W. 483. —In order to establish the determination of a life estate, hearsay evidence of the death of the *cestui qui vias* is not, as in a case of pedigree, sufficient; nor are the register of a dissenting chapel, or inscriptions on the tombstones in the adjacent burial ground receivable. *Whit-tuck v. Waters*, 4 C. & P. 375.

(*l*) *Birt v. Barlow*, 1 Doug. 173. "They are in the nature of records, and need not be produced or proved by subscribing witnesses." Per Lord Mansfield, ib. See 52 Geo. 3, c. 146, s. 17. Qu. however, whether they can be proved by oral evidence. Per Buller, J., 2 Evans's Pothier, 130.

(*m*) *Birt v. Barlow*, Doug. 173. See *Drake v. Snyth*, 5 Price, 369; tit. TITHES.

(*n*) Ib.

(*o*) *Doe v. Barnes*, 1 M. & R. 386.

(*p*) *Cope v. Cope*, 1 M. & R. 269; where it was said that similar evidence had been received in *Morris v. Davis*.

ter is no proof of the identity of the parties (*q*); nor is it evidence that a party was of the particular age stated in the register (*r*).

Public records of a parish.

It has been held at *Nisi Prius* (*s*), that annual returns made to the registry of the diocese, according to the requisitions of the 70th canon, are admissible only as secondary evidence, but that returns made under the stat. 52 Geo. 3, c. 146, would be proveable by examined copies or originals.

The bishop's register was held to be admissible to establish a custom as to the nominating a curate (*t*).

A copy taken from a book produced by the parson of a parish, as being the parish register, upon application made to him for it, will be sufficient (*u*). But if to such application he reply that there is no such register for the particular year, that will not be evidence of loss sufficient to let in secondary evidence (*v*).

In an action for the disturbance of the plaintiff in the use of his pew at church, an old entry made in the vestry-book by the churchwardens, stating that the pew had been repaired by the owner of a messuage under whom the plaintiff claimed, was admitted as evidence of the right, having been made as to a fact within the scope of the churchwarden's office, and being evidence of the reputation in the parish as to the right (*w*). An entry in a vestry-book has also been admitted to prove an averment in an indictment for a libel, that the prosecutor had been elected treasurer at a vestry duly held in pursuance of notice (*x*).

Parish books.

(*q*) 1b. Doug. 162. See tit. POLYGAMY—MARRIAGE.

(*r*) *Withen v. Law*, 3 Starkie's C. 63. *R. v. Clapham*, 4 Carr. & P. C. 29. Nor without evidence to show that the party was young when christened, is it evidence that he was born within the parish. *R. v. North Pellerton*, 5 B. & C. 508. *Burghart v. Angerstein*, 6 C. & P. 690. *Duins v. Donovan*, 3 Hag. 301.

(*s*) *Walker v. Beauchamp*, 6 C. & P. 552.

(*t*) *Arnold v. Bishop of Bath and Wells*, 5 Bing. 306. A faculty by Archbishop of Canterbury to inhabitants of *F.* to christen and bury there, is evidence to show that *F.* is not a parish. *Isham v. Wallace*, 4 Sim. 25. Note, that the document was produced from the possession of a person whose rights were abridged by it. Extracts from the Bishop's register of the appointment to parish offices are evidence to show the right exercised by the parishioners

concurrently with the rector. *Hartley v. Cooke*, 5 C. & P. 441. And see *Bishop of Meath v. Belfield*, 1 Wils. 215. *Rulien v. Michell*, 2 Price, 399. See further as to Bishop's books, *Humble v. Hunt*, Holt's C. 601.

(*u*) *Walker v. Beauchamp*, 6 C. & P. 552.

(*v*) *Ibid.*

(*w*) *Price v. Littlewood*, 3 Camp. 388. See Vol. II. tit. *Pew*.

(*x*) *R. v. Martin*, 2 Camp. C. 100. So corporation books concerning the public government of a city or town, where they have been publicly kept, and the entries have been made by a proper officer, are admissible evidence of the facts witnessed in them. *R. v. Mothersall*, 1 Str. 93. *Thetford Case*, 12 Vin. Ab. 90, pl. 16. *R. v. Mayor, &c. of Liverpool*, 4 Burr. 2244. See also *Button v. Cope*, Peake's C. 30.

Parish
books.

On an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the handwriting of a former parish officer. It was held that such evidence was inadmissible (y).

An old entry in a vestry-book is not admissible on the part of the parishioners to show that they have the right concurrently with the rector to elect to a parish office, there being nothing to show that the rector was present at the meeting (z). But such entries at meetings where the rector was present are receivable (a).

By the 17 Geo. 2, c. 38, s. 14, copies of all rates and assessments for the relief of the poor are to be kept in a book by the churchwardens and overseers of every parish, which is to be kept in a public place in the parish, and to be produced at the sessions, when any appeal is to be heard.

In the case of the Zouch peerage, a parish book of rates and loans was admitted as evidence of the existence and residence of a party in the parish in the year 1649, by the entry of the payment of her subscription to a parish loan in that year (b).

The st. 2 G. 3, c. 22, directed the registration in every parish within the bills of mortality, of all infants under the age of four years, which shall be in the workhouse, hospital, or other place provided for the maintenance of the poor, or under the care of the churchwardens or overseers of the poor, with the times when they were received, their names, ages, and such other description as could be traced.

By the 42 Geo. 3, c. 46, the churchwardens and overseers are to keep a book containing the names of all parish apprentices, and of the other particulars required by the Act; the entries are to be signed by the justices who assent to the indentures; and when the latter are proved to have been destroyed or lost, such register is to be deemed sufficient evidence in all courts of law in proof of the existence of such indentures, and of the other particulars specified in the register: and each entry, if approved, is to be signed by the justices, and such book may be inspected at all seasonable hours, and a copy taken, if the indentures are lost or destroyed.

(y) *R. v. Debenham*, 2 B. & A. 185.

(z) *Hartley v. Cooke*, 5 C. & P. 441.

(a) *Ibid.*; and extracts from the register of the Bishop of the diocese were read to prove the same appointments.

(b) Printed evidence, 162. Entries by a churchwarden not made in the course of his official duty, and by which he does not charge himself, are not admissible. *Cooper v. Bankes*, 2 C. & P. 478.

The register of the Navy-office, made up from the captains' returns, with proof of the method there used to enter all persons dead with the letters D d, is evidence of such death (c). And so is the muster-book transmitted by the officers of the ship to the Navy-office (d). So the log-book of a man-of-war which convoyed a fleet, is evidence to prove the time of sailing (e). Where a statute required that every vessel engaged in the whale fishery should carry out an apprentice for every 50 tons, and that the same should be verified by the master, mate, and two of the mariners, it was held that an affidavit verifying a muster-roll, upon which it appeared that a certain number of apprentices was on board when the vessel *cleared out*, is *prima facie* evidence that such apprentices were on board when the vessel *sailed* (f).

The custom-house copy of the searcher's report, produced by the officer in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified (g).

(c) B. N. P. 249; Bac. Ab. Ev. 635. *R. v. Rhodes*, Leach's C. C. L. 3d ed. 29. *R. v. Fitzgerald & Lee*, ib. 24. The book kept at the Sick and Hurt Office, in which are copied the different returns made by officers of the navy, of persons dying on board, is evidence to show the time of a seaman's death. *Wallace, administrator, v. Cook*, 5 Esp. C. 117. But where the wife of A. B. obtains goods after stating that her husband is dead, it is not a sufficient answer to an action for the amount, to show by the muster of a ship from the Admiralty, that a person of the name of A. B. was living at the time. *Barber v. Holmes*, 3 Esp. C. 190; Kenyon, C. J. 1800. As to the books at Lloyd's, see *Abel v. Potts*, 3 Esp. C. 242, and Vol. II. tit. POLICY.

(d) *R. v. Fitzgerald & Lee*, Leach, C. C. L. 24. *R. v. Rhodes*, ib. 24.

(e) *D'Israeli v. Jowett*, 1 Esp. C. 427. Such log-book and the official letter of the commander to the Admiralty were read without objection, as proof that the fleet encountered a storm, and that a particular vessel parted company. *Watson and another, Administrators of Maxwell, v. King*, 4 Campb. 272; Ellenborough, C. J. 1815.

And the log-book of a merchant-man may be used by a witness to refresh his memory, with respect to a fact which he

remembers to have seen there at a time when he had a clear recollection of the circumstance. *Burrough v. Martin*, 2 Camp. C. 112.

(f) *Lacon v. Hooper*, 1 Esp. C. 246.

(g) *Johnson v. Ward*, 6 Esp. C. 47. Note, that the paper was proved to have gone with the ship. So a copy of an official document, made in pursuance of an Act of Parliament, containing the names, capacities, and descriptions of passengers, was held to be good proof of such persons being on board. *Richardson v. Mellish*, 2 Bing. 229. In *R. v. Grimwood*, 1 Price, 369, it was held that excise books transcribed from the maltster's specimen paper were admissible evidence against him without calling the officers to substantiate them, even although they were charged to be fraudulent and collusive, without proof given that they were so. But a shipping entry at the Custom-house, although for some purposes a public document, is not evidence to affect the person whose duty it was to cause the entry to be made criminally, the note from which the entry had been made by the office, having been accidentally destroyed. *Hughes v. Watson*, 1 Starkie's C. 179. The entry of the contract in the book of the clerk of the coal market in London is not evidence of the sale under 47 Geo. 3, sess. 2, c. 68, s. 29, unless the buyer be proved *aliunde*

Poll-books.

Prison books.

The poll-books at an election for members in parliament are evidence in a penal action for bribery (*h*). So the daily book kept by the keeper of Newgate, and the books of the King's Bench and Fleet prisons, are evidence to prove the dates of the commitments and discharges of prisoners (*i*), although the entries are sometimes made from the information of the turnkeys, and the indorsements upon the warrants (*k*). But they are not evidence of the cause of commitment, the commitment itself being the best evidence (*l*). And it seems that they are not strictly public documents, so as to warrant the reception of a copy in evidence, since the gaoler is not required to make such entries, but does it for his own information and security (*m*). The books of the bank of England are evidence to prove the transfer of stock (*n*). The book kept in the master's office in the court of King's Bench is evidence to prove that a particular person is an attorney of the court (*o*).

An entry in the public books of a corporation is not evidence for the corporation, unless it be an entry of a public nature (*p*).

Chancellor's book.

Books of Clerk of the Peace.

A book kept by order of the Chancellor was held to be good secondary evidence of the allowance of a certificate of bankruptcy; but a book kept in the office of the secretary of bankrupts, without such order, is not admissible (*q*). Books in the office of clerks of the peace of enrolments of deputations of gamekeepers for a manor, are admissible to prove the exercise of manorial rights, without proof of the loss of the original deputations, and that the gamekeepers acted under them (*r*).

Ships' registers.*

The registry of a ship is evidence to negative ownership, since

to have signed the contract; although the Act directs that all contracts for the sale of coals shall be signed by the buyer and the factor, that the factor shall deliver a copy to the clerk, who shall enter it in a book, and although the 32d section makes such entries evidence in all cases, suits, and actions, touching anything done in pursuance of the Act. *Brown v. Capel*, 1 M. & M. 374.

(*h*) *Mead v. Robinson*, Willes, 422. *R. v. Hughes*, cited ib. *R. v. Duins*, 2 Str. 1048.

(*i*) *R. v. Aiches*, Leach, C. C. L. 2d ed. 435; 3 Bos. & Pull. 188.

(*k*) 3 Bos. & Pull. 188. On the ground that it had been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books.

(*l*) Ib. This case, therefore, and some others of a similar nature, do not rest upon the ground that the entry was made by an authorized officer. *Salle v. Thomas*, 3 B. & P. 188.

(*m*) Ibid.

(*n*) *Marsh v. Colnet*, 2 Esp. C. 665. *Breton v. Cope*, Peake's C. 30.

(*o*) *R. v. Crossley*, 2 Esp. C. 526. And see *Jones v. Stevens*, 11 Price, 235.

(*p*) *Marriage v. Lawrence*, 3 B. & A. 142.

(*q*) *Henry v. Leigh*, 3 Camp. C. 490.

(*r*) *Hunt v. Andrews*, 3 B. & A. 348.

* See the provisions made by the statute 6 G. 4, c. 110, s. 43, as to the inspection and proof of such registers, and Appendix.

no one can be an owner who is not registered as such (s); but the registry is not necessarily proof of ownership, without showing the privity of the party, since the entry may have been made by a stranger for the purpose of fraud (t). For the same reason, the mere fact of an entry of a stage coach at the licensing office is no evidence of ownership (u). On the same principle, a register is not evidence for the defendant to prove a joint ownership on a plea in abatement (x); nor (without possession) to prove an interest of another person in the ship, in an action brought by an agent on a policy of insurance, describing the interest in that other person (y); nor to prove that a ship is British built, as described in the register (z).

Ships' registers.

The books in the Heralds'-office, containing the pedigrees of the nobility and gentry of the realm, are evidence on a questio the pedigree (a); and so are the minute-books of a visitation (b), from which the entries are afterwards made in the books of the heralds' college (c). In the case of *Pitton v. Walter* (d), a minute-book

Heralds' books.

(s) *Camden v. Anderson*, 5 T. R. 709; 14 East, 229. *Marsh v. Robinson*, 4 Esp. C. 98. *Infra*, Vol. II. tit. POLICY. *Pirie v. Anderson*, 4 Taunt. 652. *Flower v. Young*, 3 Camp. 340. Abbott on Shipping, ch. 2, p. 27, and Vol. II. tit. SHIP.

(t) *Tinkler v. Walpole*, 14 East, 226. *Smith v. Fuge*, 3 Camp. 456. *Fraser v. Hopkins*, 2 Taunt. 5. *Teed v. Martin*, 2 Camp. 170. *Cooper v. South*, 4 Taunt. 102. *Ditchburn v. Spachling*, 5 Esp. C. 11. In an action for stores furnished for a ship by the captain's order, the register purporting to have been obtained by all the defendants, on the oath of one of them, was held to be *prima facie* evidence to charge them as owners. *Stokes v. Carne and others*, 2 Camp. 339. In trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce a title under it, he cannot afterwards rely upon his possession. *Sherriff v. Cadell*, 2 Esp. C. 617; Kenyon, C. J. 1798.

(u) *Strother v. Willan*, 4 Camp. C. 24. *Ellis v. Watson*, 2 Starkie's C. 453. The clause in the statute 50 Geo. 3, c. 48, s. 7, enacts that the name painted on the outside panel of each door of a public stage-coach shall be evidence of ownership, and as the enactment is general in its terms it is not confined in its application to sum-

mary proceedings before magistrates, but is in general good evidence of proprietorship. *Barford v. Nelson*, 1 B. & Ad. 571.

(x) *Flower v. Young*, 3 Camp. C. 240.

(y) *Pirie v. Anderson*, 4 Taunt. 652.

(z) *Rouse v. Meyers*, 4 Camp. C. 375. See further, as to proof of property in a ship, Vol. II. tit. POLICY.

(a) *Pitton v. Walter*, Str. 162; Salk. 281; Skin. 623; Yelv. 34. *King v. Foster*, 2 Jon. 164—224. A book found therein, purporting to be an account of the possession of property by a monastery, is not evidence of that fact. *Lygon v. Strutt*, 2 Anst. 601.

(b) *Sherriff v. Cudell*, 2 Esp. 617; 2 Jones, 224; B. N. P. 248.

(c) The visitation-books were compiled by the provincial kings-at-arms, who were usually authorized, soon after their investiture in office, by a commission under the great seal, to visit the several counties within their respective provinces, to take survey and view all manner of arms, &c. with the notes of the descents, pedigrees, and marriages of all the nobility and gentry, &c. They occupy the interval between the 21 H. 8, and the end of the reign of Jac. 2. See the first report of the House of Commons on the public records, p. 82.

(d) Str. 162.

Heralds' books.

of a visitation, signed by the heads of several families, and found in the library of Lord Oxford, was received in evidence.

But an extract from a pedigree proved to be taken out of the records is not evidence (*e*), because a copy of the record might be had, and therefore it is not the best evidence.

Official document.

The bill of cravings of a sheriff entered, and allowed, and of record in the Exchequer, was held admissible evidence upon a question of the duty of the sheriff of the county (*f*).

Commissioners' books.

Where a local Act authorised acts to be done at meetings to be called *for that purpose*, and directed that entries in the commissioners' books should be evidence; held that entries, stating orders to have been made at a meeting held by *public notice*, without showing that notice was given of the *purpose* for which it was called, was not sufficient to establish the legality of the meeting (*g*).

Land-tax assessments are admissible evidence to show the seisin of the particular person assessed; for it is the duty of the officer to ascertain and charge the occupier (*h*). And such assessments are admissible, in conjunction with other evidence, to prove the seisin of land by a particular individual, although they contain only the surname generally (*i*). But such evidence was held to be insufficient to prove the seisin of a particular individual, where it appeared that the assessors had, in the first instance, entered the name of a former owner incorrectly, and continued it after his death (*k*).

Public histories and chronicles.

Books and chronicles of public history are not admissible in order to prove particular facts or customs (*l*), but they are evidence to prove a matter relating to the kingdom at large, as being the best of which the subject-matter is capable (*m*). Camden's *Britannia* was rejected on the question, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only (*n*). And so was Dugdale's *Monasticon*, on

(*e*) B. N. P. 248.

(*f*) *R. v. Antrobus*, 6 C. & P. 704.

(*g*) *Heysham v. Forster*, 5 M. & Ry. 277.

(*h*) Coventry on Conveyancers' Evidence, c. 7, s. 1, p. 275. *Doe v. Seaton*, 2 Ad. & Ell. 171.

(*i*) *Ib.*

(*k*) *Doe d. Stansbury v. Arkwright*, 2 Ad. & Ell. 182.

(*l*) B. N. P. 248. *Cockman v. Mather*, 1 Barnardist. 14.

(*m*) *Ibid.* 249; Salk. 281. On the impeachment of Warren Hastings, the History of the growth and decay of the Ottoman Empire, by Prince Demetrius Cantemir, was received in evidence to

prove the customs in Hindostan respecting the treatment of women of rank: and after argument as to the admissibility of the evidence, it was held that the managers were entitled to read it, on the ground that it went to prove an universal custom of the Mohammedan religion. See Phillips on Evidence, vol. 1, 424, citing a report of the proceedings on the impeachment, in the possession of T. Jones Howell, the editor of the State Trials. The point was referred to by Lord Ellenborough, on the trial of General Picton, 30 Howell's St. Tr. 492.

(*n*) *Stainer v. The Burgesses of Droitwich*, Salk. 281; Skinner, 623; 1 Vent. 151.

the question, whether the Abbey de Sentibus was an inferior abbey, or not, because the original records might be had at the Augmentation-office (*o*). It was held that Dugdale's Baronage was not evidence to prove a descent (*p*). But in the case of *Neale v. Fay* (*q*), in order to show that a deed was forged which bore date 1 Ph. & M., in which all the titles were given to Philip which he used after the surrender of Charles the Fifth, chronicles were admitted to show that he did not take those titles upon him till six months after the date of the deed. And in the case of St. Katherine's Hospital, Lord Hale admitted a chronicle to prove a particular point of history in the reign of Edward the Third (*r*). The year-books are evidence to prove the course of the court (*s*).

Public histories and chronicles.

The history of a particular county is not admissible to prove the boundary between two parishes, it being admitted that the latter was coincident with the former (*t*). See further as to Almanacks—Vol. II. tit. TIME; Corporation Books—Vol. II. tit. CORPORATION; Manor Books—Vol. II. tit. COPYHOLD—MANOR.

It is a general rule, that whenever the original document is of a public nature, an exemplification of it (if it be a record), or a sworn copy, is admissible in evidence (*u*), because documents of a public nature cannot be removed without inconvenience, and danger of being lost or damaged (*x*); and the same document may be wanted in two places at the same time. The document must always be proved to be that which it purports to be, and for which it is offered, by some extrinsic proof; as in the case of records, terriers, &c., by showing that they came from the legal custody or repository (*y*). And this is in general sufficient, where the original is produced, for a record proves itself; and terriers

Public documents, how proved.

(*o*) Cited Salk. 281.

(*p*) *Piercy's Case*, 2 Jon. 164.

(*q*) *Ibid.* 282, and B. N. P. 249, and *Neale v. Jay*.

(*r*) Salk. 282.

(*s*) *Ibid.*; Spelman's *Nomina Villarum* has been received to prove Newstead to be a vill. Phillips on Evidence, vol. 1, p. 605, 8th edit. Bishop Well's *Liber de Ordinationibus Vicariorum*, has been admitted to prove an endowment. *Tucker v. Wilkins*, 4 Simons, 262.

(*t*) *Evans v. Getting*, 6 C. & P. 586. It was thrown out that the writer might have the same interest as any other inhabitant in extending the boundaries of

the county, although the case differed from that of a general history of the country.

(*u*) B. N. P. 204; Gil. Ev. 4, 5. But though a copy of a contract with the land-tax commissioners is made evidence by 42 Geo. 3, c. 116, s. 165, the original contract is not evidence by implication. *Burdon v. Richets*, 2 Camp. 121. And see Sav. 46, pl. 98. Vol. II. tit. PENAL ACTION.

(*x*) Gil. L. E. 8; Bac. Ab. Ev. F. And see *Lynch v. Clarke*, 3 Salk. 153. *R. v. Haines*, Comb. 357.

(*y*) See tit. RECORDS, JUDGMENTS, &c. See also Terriers, *supra*, 230.

and other ancient writings do not usually admit of further authentication (z).

Judgments,
&c., general
principles of ad-
missibility.

Judicial documents may be divided into, *First*, judgments, decrees, and verdicts. *Secondly*, depositions, examinations, and inquisitions, taken in the course of a legal process. *Thirdly*, writs, warrants, pleadings, bills, and answers, &c. which are incident to judicial proceedings. With respect to judgments, decrees, and verdicts, may be considered; *first*, their admissibility and effect; *secondly*, the means of proof; *thirdly*, the mode of answering such evidence. It is important to consider, in the *first* place, for what purpose a verdict or judgment is offered in evidence; whether with a view to establish the mere fact, that such a verdict was given, or judgment pronounced, and those legal consequences which result from that fact; or it is offered with a view to a collateral purpose; that is, not to prove the mere fact that such a judgment has been pronounced, and so to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact, as found by the verdict, or upon the supposed existence of which the judgment is founded.

For the first of these purposes, that is, for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed that the Court has made a faithful record of its own proceedings. And in the next place, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered; for where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, according to circumstances. For instance, if *B.*, being indicted, be convicted of beating *A.*, the record of the judgment would be incontrovertible evidence of the fact that *B.* had been so convicted; it would be conclusively presumed that the Court had kept a faithful record of its own proceedings. It would in like manner be conclusive as to all the legal consequences of such conviction. For instance, one of such

(z) For the mode of procuring access to public documents, see tit. INSPECTION.

consequences is, that *B.* shall not be punished a second time for the same offence; and consequently the record would be conclusive, when shown to the Court, to protect him from a second prosecution for the same offence. So if *B.* had been acquitted, and had brought an action against *A.* for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here again the record would have been conclusive evidence to show that fact. But next suppose, that upon *B.*'s conviction *A.* brought an action to recover damages for the assault, and offered to prove the assault by the record of conviction, he would then be offering the judgment, not with a view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose, that is, to prove the fact upon whose supposed existence the judgment was founded. With respect to such facts, that is, the facts upon which a judgment professes to be founded, the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.

Judgments,
&c.

A record is in no case direct and positive evidence of any fact which it recites, as having been found by a jury, or otherwise ascertained; it is in the nature of presumptive evidence only, for even the jury who found the fact may have acted upon mere presumption, without the aid of any direct evidence. If, therefore, no rule of policy intervened, no verdict could ever establish any fact conclusively, for it never could prove more than that the jury, in the particular case, presumed, from some evidence or other, that the fact was true. But public policy requires that limits should be opposed to the continuance of litigation upon the same subject-matter, and therefore the law will not permit a matter which has once been solemnly decided by a court of competent jurisdiction to be again brought into litigation between the same parties or their representatives (*a*); consequently a decree or judgment between the *same parties* upon the *same subject-matter* is usually conclusive as to private rights. On the other hand, it is an elementary rule and principle of justice, that no man shall be bound by the act or admission of another to which he was a stranger; and consequently no one ought to be bound, as to a matter of private right, by a judgment or verdict (*b*) to which he

Conclusive,
when.

(*a*) According to the legal maxims, "*nemo vexari debet bis pro eadem causa*," and "*reipublicæ interest ut sit finis litium*." See 3^d Wilson, 304, *Kitchen v. Campbell*.

(*b*) See the judgment of C. J. de Grey, in the *Duchess of Kingston's Case*, 11 St. Tr. 261.

Judgment
conclusive,
when.

was not a party, where he could make no defence, from which he could not appeal, and which may have resulted from the negligence of another, or may even have been obtained by means of fraud and collusion. Neither ought any one in justice to be bound by a verdict, although he was privy to it, but where his adversary was not also a party, and consequently where the verdict may have been founded upon the evidence of that adversary himself, who had an interest in obtaining a verdict for the purposes of evidence; for as he cannot give direct evidence upon the subject, he ought not to make use of his own evidence by circuitous means (*c*). Another principle which (as it is frequently said) operates to the exclusion of a verdict, as evidence, on a matter of private right, is this, that a person who could have received no prejudice from the verdict, had it been given the contrary way, shall not derive any benefit from it when it turns out to be in his favour (*d*), and because a judgment operates by way of estoppel, and estoppels must be founded on mutuality (*e*).

Another ground of objection, even where the evidence is offered against a party to the former proceeding, arises when, from the nature of the former proceeding, the party is not entitled to the same means of disproving the fact, or the same means of redress, of which he might avail himself in the second suit; for this would be virtually, although circuitously, to deprive him of those advantages. For example, to admit upon the trial of a civil action, a conviction on an indictment for felony (except for the purpose of establishing a legal consequence of the conviction), would be indirectly to deprive the party, against whom the evidence was offered, of the power of repelling the proof by means of a full defence by counsel, and of his attain of the jury for finding a false verdict.

Judgment
in rem.

These objections are however applicable to those cases only where a matter of private right or liability is concerned; for in matters of a public nature, where the proceeding is, as it is usually termed, *in rem*, public convenience requires that the sentence, decree, or judgment, should be binding upon all (*f*). In cases also where the matter is of a public nature, and where reputation would be admissible evidence, a verdict or judgment is frequently evidence, as falling within the scope of general reputation.

Such are the general considerations by which the reception of

(*c*) Gil. L. Ev. 31.

(*d*) Ibid.

(*e*) Per Lord Ellenborough, 4 M. & S.

479.

(*f*) Vide *supra*, tit. RES INTER ALIOS.

evidence of this nature is governed, depending mainly on the elementary principles already announced; viz. that no one ought to be bound by any testimony where he has not had the power of cross-examining the witness, and controverting the evidence by opposite testimony (*g*), nor by any evidence which comes within the description of *res inter alios*.

Judgment evidence as a fact, and as to all legal consequences.

The admissibility and effect of a verdict or judgment may be considered, 1st, with a view to the proof of the judgment itself as a fact, and its legal consequences; or, 2dly, with a view to the proof of the matters on which it is founded.—1st. With a view to the proof of the judgment itself *as a fact*, and its *legal consequences*.—It seems to be an incontrovertible rule, that every judgment is evidence for such purposes. An attainder of felony or treason is, in general, evidence as to all the consequences of the attainder (*h*). A conviction of the principal for felony is evidence (although not conclusive) against the accessory (*i*). A conviction of an infamous crime is evidence against all, to show the incompetency of the party as a witness (*k*). So the judgment by a person of competent authority is evidence to protect him against actions for any matter judicially done within the scope of that authority (*l*). For his immunity is a legal consequence of his acting in that situation; and the judgment is offered, not to prove the truth of the facts upon which it is founded, since, with a view to such a defence, the truth of those facts is not material, but in order to prove the fact of a judgment pronounced by competent authority, and so to establish the immunity of the judge, which is a legal consequence of the judgment (*m*). In these, and a number of other instances, where a judgment is admitted to prove the fact itself, and with a view to its legal consequences, every such judgment may be considered as operating *in rem* (*n*).

In an action by *A.* against a sheriff, for trespass to his goods, the defendant may give in evidence a judgment against *B.*, and that he seized the goods by virtue of a *fieri facias* upon that judgment, and thereupon seized the goods in question, being the goods of *B.* So where the title to particular goods is litigated between *A.* and *B.*, it is competent to *A.* to show a judgment against *C.*, and that the sheriff sold the goods to him, being the goods of *C.*, under a *fieri facias*. A judgment in *assumpsit* against three de-

Judgment always evidence as a fact.

(*g*) *Supra*, tit. EXCLUDING TESTS.

(*h*) *Vide infra*, tit. ACCESSORY.

(*i*) *Ibid*.

(*k*) *Supra*, tit. WITNESS.

(*l*) *Vide infra*, tit. CONVICTIONS BY JUSTICES, Vol. II.

(*m*) *Infra*, ib. tit. JUSTICES—TRESPASS.

(*n*) *Supra*, tit. RES INTER ALIOS.

Judgment
always evi-
dence as a
fact.

fendants as partners, is *primâ facie* evidence for one against the others, to prove their liability to contribution (*o*).

So where *A.* has obtained a verdict against *B.* for the negligence of his agent *C.*, in an action by *B.* against *C.*, the recovery in the former action is evidence, not to prove the fact on which it was founded, *viz.* the negligence of *C.*, but to show how far *B.* has been damnified (*p*); the judgment here is the best evidence to show the amount of *B.*'s liability to *A.*, but it is no evidence to show that such liability was the consequence of *C.*'s negligence, a fact which must be proved *aliunde*. So a verdict in a former cause *inter alios* is admissible for the purpose of introducing evidence to show that a witness on the former trial gave evidence directly contrary to that which he gives on the latter (*q*).

So in an action for a malicious prosecution, an indictment against the plaintiff is evidence to show the act done by the defendant in the prosecution of his malicious intention, and also to show the plaintiff's acquittal (*r*). So a record is frequently evidence by way of inducement, as upon an indictment for perjury (*s*).

Judgment
in matter
of private
litigation.

Secondly, With a view to the proof of those matters on which the judgment is founded. It will for this purpose be convenient to divide all adjudications into, *First*, Those which relate to *matters of private litigation* between party and party; *Secondly*, those of a criminal and penal nature; *Thirdly*, those which relate to proceedings *in rem*; *Fourthly*, those which relate to matters usually proved by reputation. *First*, as to the admissibility of a verdict or judgment relating to a matter litigated between parties.—It has been laid down by great authority, that in civil cases the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea or bar, and as evidence (*t*), conclusive between the same parties upon the same matter directly in question in another court: and that the judgment of a court of exclusive jurisdiction is, in like manner, conclusive upon the same matter coming incidentally in question in another court, between the same parties for

Judgments
between
private
persons.

(*o*) 2 N. R. 371.

(*p*) *Green v. The New River Company*,
4 T. R. 590.

(*q*) *Clarges v. Sherwin*, 12 Mod. 343.
B. N. P.

(*r*) See Vol. II. tit. MALICIOUS PROSECUTION.

(*s*) See Vol. II. tit. PERJURY.

(*t*) Although the celebrated judgment in the *Duchess of Kingston's Case* has received frequent sanction from eminent Judges by whom it has been cited with-

out qualification, it will be seen from the modern authorities below referred to that the case where a former judgment is used, not as a decision on the identical subject-matter of complaint, but as a decision on the same controverted point, which is to operate by way of *estoppel*, it cannot so operate unless it be pleaded, even although the party seeking to avail himself of it, had no opportunity for pleading it, as where he is defendant in an ejectment.

a different purpose. But that neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from the judgment (*u*).

Judgments
between
private
persons.

This was part of the judgment of C. J. de Grey, in the case of *The Duchess of Kingston*. The principal position amounts to this, that no matter once litigated and determined by proper authority shall a second time be brought into controversy between the same parties.

It is then essential to consider, *First*, The identity of the parties. *Secondly*, Of the matter litigated. *Thirdly*, The nature and manner of the adjudication. *Fourthly*, The application of the adjudication to the fact to be proved. *Fifthly*, The effect of the judgment.

Identity of
parties.

No one, in general, can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. For otherwise he has no power of cross-examining the witnesses, of adducing evidence in furtherance of his rights; he can have no attaint, nor can he challenge the inquest, or appeal; in short, he is deprived of the means provided by the law for ascertaining the truth and excluding error, and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger (*x*).

Must be
against a
party, or
privity.

Hence, if one bring several ejectments against several, upon the same title, a verdict against one is not evidence against the rest, because the party against whom the verdict was had might be relieved against, if it was not good, but the rest could not (*y*).

So a verdict against a tenant for life will not bind a reversioner (*z*). For the tenant for life is seised in his own right, and that possession is properly his own. He is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the

(*u*) By De Grey, C. J., in giving judgment in the *Duchess of Kingston's Case*, 11 St. Tr. 261. A verdict is conclusive between the same parties on the same facts, unless it has been reversed by attaint, Co. Litt. 227 b. A defendant who has omitted to plead his certificate under a commission of bankrupt in a former action, by plea *puis darrein continuance*, cannot plead it to an action on the judgment. *Todd v. Muxfield*, 6 B. & C. 105.

(*x*) 11 H. 4. 30; Tr. per Pais, 29, 30; 44 Ass. 5. *Kinnersley v. Orpe*, Dougl. 57.

(*y*) 3 Mod. 142. *Bell v. Harwood*, 3 T. R. 308; Lord Ray. 1292; Vern. 415; Ch. Pr. 212; 12 Mod. 319. 339; 10 Mod. 292; Carth. 77. 181; 5 Mod. 386; 2 Jones, 221.

(*z*) B. N. P. 232; Hardr. 402; Yelv. 32.

matter where no aid is prayed. But if the reversioner were to come in upon an aid prayer; he might then have an attaind, and consequently the verdict would then be evidence against him (a).

Those
claiming in
privity.

But one who claims *in privity* with another, is in the same situation with the latter as to any verdict or judgment, either for or against him, whether he claim as privy in blood or estate, or as privy in law (b). Accordingly the heir may give in evidence a verdict for his ancestor (c). And a verdict against the ancestor binds the heir (d). So a verdict against an intestate or testator binds his representative (e). So in ejectment between *Doe* on the demise of *A.* and *B.*, *A.*, it is said, is bound by a verdict for the defendant. For the Courts take notice that in ejectment the lessor of the nominal plaintiff is the party really interested, and upon the trial *A.* had the opportunity to cross-examine the witnesses for *B.*, and to controvert their testimony (f).

If several remainders be limited by the same deed, a verdict for one in remainder will be evidence for the next in remainder against the same party (g). But a verdict against a particular tenant for life does not bind the reversioner unless he come in to defend upon aid prayer (h): and consequently, for want of mutuality, a verdict for the tenant for life would not be evidence for the reversioner unless called in aid against the same party (i). Partly upon the

(a) *Ibid.*

(b) Such verdict and judgment operate as an estoppel, when pleaded in bar. Com. Dig. Estoppel, B.; Co. Litt. 352. *Vooght v. Winch*, 2 B. & A.; *Outram v. Morewood*, 3 East, 316; 16 East, 334. *Inclendon v. Burgess*, 1 Show. 28. *Hooper v. Hooper*, M'Clellan & Y. 509. One having lands by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law, or in the post, are mentioned by Lord Coke as examples of privities in law, Co. Litt. 352 b. A verdict against an unmarried woman is admissible against her husband and herself after marriage. *Outram v. Morewood*, 3 East, 353. A judgment against a schoolmaster is evidence against his successor. *Brownker v. Atkins*, Skinn. 15. See Vol. II. tit. TITHES—QUO WARRANTO.

(c) *Locke v. Norborne*, 3 Mod. 141.

(d) *Locke v. Norborne*, 3 Mod. 141; and *R. v. Hebden*, And. 389.

(e) *R. v. Hebden*, And. 389.

(f) Bac. Ab. tit. Ev. F. 616; B. N. P. 232; Hardr. 472; Gil. L. Ev. 33. *Aslin v. Parkin*, 2 Burr. 668. It may be doubted whether the older authorities on this subject do not relate to the now obsolete action of *ejectione firmæ*, in which the pleadings were carried on and issue joined as in other ordinary actions of trespass. It has, however, lately been held, that a judgment for the defendant in a former ejectment is evidence for him on a subsequent ejectment, the lessor of the plaintiff being the same. *Doe d. Strode v. Seaton*, 2 C. M. & R. 731; and see *Wright v. Tatham*, 1 Ad. & Ell. 19.

(g) 1 Ray. 730; B. N. P. 232; Hardr. 402.

(h) B. N. P. 232; Hardr. 436; Bac. Ab. Ev. 617; but see Phillips, 317; Hardr. 472; Gil. L. Ev. 35, 36. *Bishop of Lincoln v. Sir W. Ellis*, 2 Gwill. 632.

(i) B. N. P. 232, 233; Ca. K. B. 319.

same principle, judgment of ouster against a mayor is evidence upon a *quo warranto* against one admitted by him (*k*). Those claiming in privity.

Two plaintiffs brought an action for a diversion of water from their works. One of them, whilst in possession of the same works, had recovered against the same defendants for a similar injury. It was held that this was *primâ facie* evidence of privity in estate with the former plaintiff to render the former verdict and judgment admissible in evidence against the defendants (*l*). A former verdict and judgment are admissible between privies, although those who offer the evidence may have been examined in the former suit (*m*). But although a verdict and judgment for a party is evidence for one claiming in privity with him, this must be understood of a claim acquired subsequently to the verdict (*n*).

If a party, after a verdict and judgment against him, assign his interest, the assignee is bound by the verdict. After a verdict against *J. S.* and judgment, *J. S.* aliened to *J. N.*, and it was held that the verdict was evidence against *J. N.*; for it would have been evidence against *J. S.* at the time of the transfer, and the substitute cannot be in a better condition than the principal (*o*).

In ejectment on the several demises of a mortgagor and mortgagee, a judgment in an ejectment brought against the mortgagor after the mortgage, is not admissible for the lessor of the plaintiff in the former action as against the mortgagee, although the judgment was entered in pursuance of the award of an arbitrator, to whom the cause was referred, there being no evidence to show that the mortgagee took any part in the proceedings (*p*).

(*k*) *B. N. P.* 231; 2 Barnard. 370. *R. v. Lisle*, And. 163. *R. v. Grimes*, Burr. 2968; 5 T. R. 72; 11 St. Tr. 216. See tit. *QUO WARRANTO*.

(*l*) *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 133.

(*m*) *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 139. See also *Brook v. Carpenter*, 3 Bing. 300, and Vol. II. tit. *MALICIOUS PROSECUTION*. See also *Davis v. West*, 6 C. & P. 172; where a conviction obtained on the evidence of one defendant, was admitted in favour of co-defendants.

(*n*) *Doe v. Earl of Derby*, 1 Ad. & Ell. 787, and the rule laid down Com. Dig. Ev. (A. 5), viz. that a verdict is evidence for one under whom any of the present parties claim, must be so understood. If it could be understood to extend to other lands

under the same title previous to the verdict, the effect of such verdict might be carried back to an indefinite extent. Per Littledale, J., 1 Ad. & Ell. 787. So a verdict against a lessor is admissible.

(*o*) 2 Roll. Ab. 680; Bac. Ab. Ev. F. 617. The answer of a Dean and Chapter to a bill filed to establish a farm modus, admitting a distinct modus, is evidence against a subsequent lessee of the Dean and Chapter in a suit by him for title in kind. It is said that a verdict and judgment for or against a lessee is evidence for or against a reversioner. Com. Dig. Ev. (A. 5), Gil. Ev. 35, 36. *Rushworth v. Countess of Pembroke*, Hardr. 472. This it seems is to be understood of a lessee in the old action of *ejectione firmæ*.

(*p*) *Doe v. Webber*, 1 Ad. & Ell. 110.

Form of
action.

It is not essential that either the parties or the form of action should be precisely the same, if they are substantially the same. Thus in ejectment, as has been seen, the law recognizes the real parties (*q*). Where an action of trover was brought against a creditor and the sheriff, for goods levied under an execution, and the defendants had a verdict, the judgment was held to be a bar to a subsequent action of *assumpsit* against the creditor alone (*r*).

In an action for a trespass in the plaintiff's fishery (*s*), a verdict for the plaintiff in a former action, against one who justified as the servant of *J. S.*, was admitted in evidence against the defendant in the second action, upon its appearing that the defendant in that action had acted by the command of *J. S.*, for it was considered that *J. S.* was the real party in both actions (*t*). But the evidence is not conclusive.

So a verdict in an action by the vicar against the occupier of land, for tithes, is evidence against another occupier of the same land (*u*). A judgment against the schoolmaster of a hospital, as to rights claimed in respect of his office, is evidence against his successors (*x*). So a decree in favour of a vicar as to his right to small tithes, against an impropiator, is evidence for his successors (*y*). A verdict against one defendant was held to be evidence of the plaintiff's right on a second action against the defendant and two others, who justified under the former defendant for a subsequent injury affecting the same right (*z*).

So in an action by *A.* and *B.*, a judgment in a former action upon the same rights brought by *A.* alone was held to be admissible (*a*).

Against
one who
might have
been a
party.

A record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced (*b*).

(*q*) *Supra*, 258; *supra*, note (*f*). And see *Strode v. Seaton*, 2 C. M. & R. 217.

(*r*) *Kitchen v. Campbell*, 2 Bl. 827; 3 Wils. 304. See below, p. 262, and the cases there cited.

(*s*) *Kinnersley v. Orpe*, Dougl. 56. At the trial it was held to be conclusive evidence; but the Court of King's Bench held that it was admissible, but not conclusive. See *Simpson v. Pickering*, 1 C. M. & R. 529. It is not sufficient to show that a party to the former suit might possibly be interested in the subsequent suit.

(*t*) See the last preceding note.

(*u*) *Brown v. Olive*, 2 Gwill. 701. *Travis v. Chaloner*, 3 Gwill. 1237.

(*x*) *Lord Browneker v. Sir R. Atkins* Skinn. 15.

(*y*) *Carr v. Heaton*, 3 Gwill. 1261; but, as it is said, not conclusive evidence, unless the Ordinary be a party to the first suit.

(*z*) *Strutt v. Bovingdon*, 5 Esp. 56. In Buller's N. P. 40, it is said that a verdict on an issue out of Chancery, to which only one of the defendants was party, may be read against all the defendants, to prove the time of the act of bankruptcy.

(*a*) *Blakemore v. Glamorganshire Canal Company*, 2 Cr. M. & R. 133. Note, that *B.* claimed in privity with *A.*, and the evidence was held to be admissible, although *B.* had been a witness on the former trial.

(*b*) Bac. Ab. Ev. F. 616.

It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words the benefit to be derived from the verdict must be *mutual* (c). This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point (d). And the verdict ought not to be admitted to prejudice the jury against the former litigant (e). Besides, the former verdict may have been obtained upon the evidence of the party who afterwards seeks to take advantage of it; and this is one reason why a conviction upon an indictment at the suit of the king is not evidence in a civil action (f).

Want of
mutuality.

From the principles announced, it seems to be a general consequence that a *verdict in a civil proceeding* will not be evidence either against or for a party *in a criminal proceeding*. The *acquittal* in an action ought not to be admitted as evidence in bar of an indictment, because the parties are not the same, and the king or the public ought not to be prejudiced by the default of a private person in seeking his remedy for an injury to himself; especially as upon the trial of the indictment the testimony of the former plaintiff is admissible, which was before excluded by

Verdict in
civil pro-
ceeding,
whether
evidence in
a criminal
case.

(c) B. N. P. 232, 3; Ca. K. B. 319; Hardr. 472; Bac. Ab. Ev. F.; 4 Maul. & Sel. 479; Co. Litt. 352; 1 T. R. 86; Com. Dig. Estoppel, D. *R. v. The Warden of the Fleet*, B. N. P. 233; 12 Mod. 337. In the case of *Whately v. Mannheim and Levy*, 2 Esp. C. 608, Lord Kenyon is said to have held, that a verdict on an issue out of Chancery, to try the question, whether A. and B. were partners, was evidence for a third person, in an action against them to prove the partnership. *Sed qu.*, for there was no mutuality; and the verdict might have been obtained on the evidence of the party who afterwards took advantage of it.

(d) B. N. P. 232; 3 Mod. 141; Hardr. 472.

(e) In Gil. L. Ev. the principle is thus expounded:—But a person that hath no prejudice by the verdict can never give it in evidence, though his title turn upon the

same point, because if he be an utter stranger to the fact it is perfectly *res nova* between him and the defendant; and if it be no prejudice to the plaintiff had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, since the cause is a new matter between the parties, that the jury should be swayed by any prejudice; for the letting in of pre-judgments supposes that the case has been already decided, and that it is not tried and debated as a new matter, but as the effect of some litigious cross in the defendant, that holds out the possession when the cause has been decided against him; and this ought not to be thrown out upon him on a new inquiry.—The same principle applies to depositions. Hardr. 472.

(f) B. N. P. 233; Str. 68. *Gibson v. Macarty*, Ann. 311. *Bartlett v. Pickersgill*, Burr. 2255.

Verdict in civil proceeding, whether evidence in a criminal case.

his being a party to the cause. By such additional evidence the jury may be induced to come to a contrary conclusion (*m*). Neither, as it seems, is a *verdict for the plaintiff* in a civil action evidence upon an indictment (*n*); for although the defendant has had the opportunity to cross-examine the witnesses and controvert the testimony of his opponent, yet it would be hard that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property.

In addition to this, there is a want of mutuality; the parties are not the same, and the party would lose the privilege of proceeding against the jury in case of a false verdict, by attaint. It is also to be observed, that the adjudication in the civil case would seldom be commensurate with the matter intended to be proved in the criminal case, since evidence sufficient to render a man responsible in damages may be insufficient to prove that he acted with a criminal intention.

Verdict between private parties. Identity of the fact.

Secondly, It is essential not only that the parties should be the same, but that the *same fact* should have been in issue in the former cause; for if it was not in issue, the jury could not have been attainted for a false verdict (*o*).

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And the *cause of action* is the same, when the same evidence will support both actions, although the actions may happen to be founded on different writs (*p*). This is the test to know whether a final determination in a former action is a bar, or not, to the subsequent action; and it runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrer's Case* (*q*), that where one is barred in any action,

(*m*) Ca. Tem. Hardw. 312; 11 St. Tr. 222.

(*n*) 11 St. Tr. 222.

(*o*) B. N. P. 233; Hob. 53.

(*p*) Thus a judgment in trespass will be a bar to an action of trover for the same taking; Bl. R. 831; Com. Dig. Action, K. 3. And a verdict in trover will be a bar to an action for money had and received for the sale of the same goods. *Kitchen v. Campbell*, 2 Bl. 827; 3 Wils. 308. See also *Lechmere v. Toplady*, 2 Vent. 169; 1 Show. 146. A recovery in trespass at common law will bar a writ of ravishment of ward, Hob. 94; 2 Inst. 200; Per Lord Hardwicke, in *Smith v. Gibson*, R. T. H. 319, there are several cases where a recovery in one action will be a bar to another

action of the same nature; but that is where the first recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant, which vests the property in him, and therefore it is a bar to an action of trespass for the same thing: and therefore it was held, that damages, on a contempt in prohibition, which are recoverable only from the time of the prohibition granted, were no bar to an action for suing the plaintiff in the Admiralty Court, where the Court had no jurisdiction. See *Sparry's Case*, 5 Co. 61; Preface to 8 Co., and 6 Co. 7 a.; and see Vol. II. tit. RECORD.

(*q*) 6 Rep. 7.

real or personal, by judgment, upon confession, demurrer, verdict, &c., he is barred as to that, or the like action of the like nature for the same thing, for ever; for *expedit reipublicæ ut sit finis litium*. By actions of the like nature are meant actions of the same degree, and where a writ cannot be had of a higher nature (*r*). All personal actions are of the same degree (*s*); but a verdict in a personal action was not a bar to a real action brought by the same right (*t*).

Same cause of action.

Where, however, the real merits of the present action have not been at all inquired into in a former proceeding, issue may be taken on the fact, the judgment being pleaded in bar (*u*). Thus a recovery in one action cannot be pleaded in bar of a second, where no evidence on the trial of the first action was given in support of the claim on which the second is founded (*x*). Where issue is taken

(*r*) A bar in a writ of *aici*, was held to be a bar in a writ of *Besael*; and in a collateral action, as *cosenage*; for these are ancestral, and of the same nature: but will not bar a writ of right, 3 Wils. 308; 6 Rep. 7.

(*s*) And therefore, in an action for taking a mare, it is a good plea to the writ, that a replevin is pending for the same taking, 3 Wils. 308; 5 Rep. 61 b.

(*t*) See *Outram v. Morewood*, 3 East, 359.

(*u*) *Kitchen v. Campbell*, 2 Bl. R. 827; 3 Wils. 304.

(*x*) *Seddon v. Tutop*, 6 T. R. 107. So in the cases of *Ravee v. Farmer*, 4 T. R. 146, and *Golightly v. Jellicoe*, *ib.* in note, it was held that an award made of all matters in difference between the parties, was no bar to any cause of action that the plaintiff had against the defendant at the time of the reference, if the plaintiff could prove that the subject-matter of the action was not inquired into before the arbitrator. But if a plaintiff having several causes of action, offers evidence of some in which he fails, he cannot afterwards bring another action for those causes of action in which he has failed. Per Best, C. J., in *Stafford v. Clarke*, 2 Bing. 382. See *Hall v. Stone*, 1 Str. 515. *Markham v. Middleton*, 2 Str. 1259. So if a plaintiff sue in an inferior court for a less sum, having a claim for a larger sum, or having a demand for 60*l.*, consisting of three sums of 20*l.*, consent at *Nisi Prius* to take a verdict for

40*l.*, he cannot afterwards bring a second action for the residue. *Lord Bagot v. Williams*, 3 B. & C. 235. See also *Bowden v. Horne*, 7 Bing. 716, as to the effect of a *nolle prosequi* as to part of a sum recovered. In the case of *Dunn v. Murray*, 9 B. & C. 780, where a claim within the scope of a reference to an arbitrator was not brought forward by the plaintiff as a matter in difference, it was held that he could not afterwards make it the subject-matter of a fresh action. And there Lord Tenterden, in giving judgment, referred to that of Lord Ellenborough in *Smith v. Johnson*, 15 East, 213, who laid it down that where all matters in difference are referred, the party, as to any matter included within the scope of such reference, ought to come forward with the whole of his case. A plaintiff brought debt for rent and for stone taken from a quarry, and before the trial brought another action for improperly quarrying stone, with a count in trover for stone, and delivered bills of particulars for similar quantities of stone; on the first trial he gave no evidence as to the claim for stone, but recovered as to the rest; in the second he had a verdict for the stone taken away, and it was held by the Court of Exchequer, on a review of the authorities, that the trial was not waived, nor the action barred, by the former recovery. *Hadley v. Green*. 2 Tyrr. 390.

Identity of
the fact.

on the fact, whether the second action is brought for the same cause of action as the first, evidence is admissible of what passed at the trial (*y*).

It is not, however, necessary that the fact to be proved by the record should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of that verdict. A verdict against a division of a parish, for not repairing a road, is afterwards (in the absence of fraud) conclusive as to the obligation to repair, although the verdict also involve another fact; viz. that the road was out of repair (*z*). So a verdict in an action for diverting water from the plaintiff's mill, is evidence in a subsequent action for a similar injury at a subsequent time (*a*), as to the right to the water (*b*). In such case, however, the record would operate as evidence only, and not as an *estoppel*.

It is not necessary that the former verdict should have been founded upon the same precise subject-matter, provided the question be the same, and between the same parties. It is laid down that "it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and every matter is *evidence* that amounts to a proof of the point in question" (*c*).

Where the same party sues, or is sued, in a different capacity, and in a different right, he will not be concluded by the former record. Thus, if a party sue as administrator, and fail, he will not be estopped from maintaining an action against the same defendant as executor (*d*). So if one claim as heir to his father, he will not be estopped from afterwards claiming as heir to his mother (*e*).

Must be
direct.

Thirdly, as to the nature and manner of the adjudication; the judgment, decree, or sentence, must be direct upon the precise point, and is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court, nor of any matter *incidentally* cognizable, nor of any matter to be in-

(*y*) *Seddon v. Tutop*, 6 T. R. 607. *Marten v. Thornton*, 4 Esp. C. 180, where an arbitrator was examined as to the evidence laid before him.

(*z*) *R. v. St. Pancras*, Peake's C. 219: 2 Saund. 159; 2 Camp. C. 494. See tit. HIGHWAY.

(*a*) *Strutt v. Boringdon and others*, 5 Esp. 56, although other defendants be joined in the second action to the sole defendant in the first, but who justify under that defendant; *ibid*.

(*b*) Lord Ellenborough said, that al-

though the former recovery could not be deemed to be a legal estoppel, so as to conclude the rights of the parties by its production, he should think himself bound to tell the jury to consider it as conclusive. 5 Esp. C. 59.

(*c*) B. N. P. 232. *Lewis v. Clarges*, 1700. It seems, however, that in such a case the verdict would not be conclusive. In Gil. L. Ev. 29, the case is put as one of *persuading evidence* to a jury.

(*d*) *Robinson's Case*, 5 Rep. 32.

(*e*) Com. Dig. Estoppel, C.

ferred by argument from the judgment, as having constituted one of the grounds of that judgment(*f*). For it is obvious, that although the matter expressly adjudicated upon is certain, the grounds of the adjudication are often uncertain; and that a particular ground cannot be safely inferred and relied upon, especially where its effect is to be conclusive. To permit this would induce the necessity of unravelling the materials of the former decision; for it would be manifestly unjust to admit a presumption that a particular fact was established upon the former inquiry, and yet not to allow that presumption to be rebutted by proof that it is unfounded. In *Blackham's Case*(*g*), which was an action of trover, the defendant proved that the goods were Jane Blackham's in her lifetime, and that he had administered to her effects. The plaintiff proved that Jane Blackham was married to him a few days before her death. The defendant contended that the plaintiff was concluded by the letters of administration granted to himself, since the letters of administration must have been founded upon the presumption that there was no such marriage. But Holt, C. J. said, a matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point *directly tried*; otherwise it is, if a *collateral* matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant,

(*f*) See the opinion of De Grey, C. J. in the *Duchess of Kingston's Case*, 11 St. Tr. 261; Harg. Law Tracts, 456; Pothier by Evans, 357. *Lewick v. Lucas*, 1 Esp. C. 43. Action on the case for unskilfully varnishing engravings: the defendant proposed to give in evidence the record in an action in which he recovered against the present plaintiff for work and labour, and to show by parol evidence that the two actions related to the same work. Lord Kenyon rejected the evidence, because the record was general; and in order to render a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself; nor should evidence be admitted that under such a record any particular matter came in question. The record in the former action was general; and to inquire whether the object of it was to recover for the work done in varnishing the prints, and whether the defendant in that action had availed himself of the circumstance of their being unskilfully done,

would be to try that same case again. In some instances, however, it is necessary to show by parol evidence to what particular subject-matter a record, general in its terms, was applied; as, for instance, where a defendant pleads a recovery by the plaintiff in a former action for the same subject-matter, and where issue is taken on the question, whether the former verdict embraced the present claim. *Supra*, 262, and see tit. PAROL EVIDENCE; and see *R. v. Knaptoft*, Vol. II. tit. SETTLEMENT. Where the appellant parish, on a second order, shows that the former order was quashed upon appeal, it is competent to the respondents to show that it was quashed on the preliminary objection that the pauper was not chargeable. *R. v. Wheelock*, 5 B. & C. 511. See Vol. II. tit. SETTLEMENT. *Reed v. Jackson*, 1 East, 355. *Rez v. Wick St. Lawrence*, 5 B. & Ad. 526.

(*g*) 1 Salk. 200; see 7 Bro. P. C. 319; *Ibid.* 414.

Manner of
the adjudi-
cation.

therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be if the point there tried had been married or unmarried, and their sentence had been, not married. So, although it was once held that the production of the probate by a prisoner indicted for the forging of a will, was conclusive evidence for him (*h*), the contrary has since been frequently adjudged, and is now settled law (*i*). So the refusal of letters of administration, on the ground that the applicant was not married to the deceased, is not evidence to disprove the marriage in a court of law (*k*). And a sentence of excommunication against the father and mother for fornication is not evidence to disprove the legitimacy of the son (*l*). Letters of administration granted to the plaintiff as administrator of the goods of *A. B.*, are not evidence of the death of *A. B.* (*m*). And the judgment is not evidence, if the point arose *collaterally* in the original suit, although it appear from the pleadings that it was expressly in issue. Where a suit was instituted in the Ecclesiastical Court by *B.* against *C.* for a divorce, *causâ adulterii*, with *D.*, and she pleaded that she was married to *D.*, and upon proof made, the Court so pronounced, and accordingly dismissed *B.*'s libel, it was held that the judgment was not evidence in an ejectment, in which the marriage between *C.* and *D.* came in dispute (*n*). The principle of this case must, however, be limited to cases where the question arises between *different parties*; for if issue be joined upon a particular point, the verdict upon that point would (in civil courts at least) be evidence upon the *same point* between the *same parties* (*o*). So if in an ejectment between a devisee and the heir-at-law, the defendant should obtain a verdict, on proof that the will was not duly executed, he could not give the verdict in evidence on another ejectment brought by another devisee (*p*). If in an information against *A.* issue were taken on the fact whether *J. S.* was mayor of such a borough in such a year, and it were to be found that he was not, such finding and judgment would not be evidence on the like information against *B.* (*q*).

(*h*) *R. v. Vincent*, Str. 481. *R. v. Rhodes*, *ibid.* 703; 1 Wils. 75.

(*i*) See 11 St. Tr. 221. *R. v. Sterling*, Leach, 117. *R. v. Buttery and another*, 10 B. Dec. 1817, and afterwards before the Judges, Hil. 1818; and *R. v. Gibson*, Lancaster, 1802, cor. Lord Ellenborough. Evans's Pothier, 356.

(*k*) Ann. 12.

(*l*) *Hilliard v. Phaley*, 8 Mod. 180.

(*m*) *Thompson v. Donaldson*, 3 Esp. C. 63. The probate of a will devising real

property is not evidence of the contents of the will. *Doe v. Calvert*, 2 Camp. 389. *Hume v. Rundall*, 6 Madd. 331. B. N. P. 245. *R. v. Nethersell*, 4 T. R. 258. Nor as to copyholds, Vol. II. tit. COPYHOLDS.

(*n*) B. N. P. 244, cites *Robin's Case*, C. B. 1760. In this case, however, the evidence was offered with a view to affect other parties.

(*o*) *Da Costa v. Villa Real*, Str. 961.

(*p*) B. N. P. 244.

(*q*) This instance is given in Buller's

It seems, also, that the former judgment or sentence must not only be direct, but also final and *conclusive* (r) in the court of which it is a judgment upon the subject-matter; for if it do not decide the fact there, it cannot have a greater effect in any other court (s). Hence, although a sentence in a jactitation suit has been admitted in evidence as to the fact of marriage in a temporal court, it seems in principle to be wholly inadmissible, at least as against those who were not parties to the suit (t). A colonial judgment cannot be pleaded in bar of an action in this country, unless it would have been conclusive in the colony, although the judgment has been pronounced by a court of error in the colony, and by the King in Council (u).

Manner of
the adjudication.

Neither will a foreign judgment be acted upon where the proceedings are imperfect (x). A decree in a foreign court of equity will not support an action where the amount of the sum due is left indefinite (y).

It has been held that proceedings which would not constitute an estoppel are not *prima facie* evidence of the fact (z).

Fourthly and fifthly, assuming then, that a Court of competent

N. P. 244, in illustration of the rule, that a determination is not evidence, unless it be *ex directo*; but it is to be observed that, had the decision been *directly* against *J. S.*, it would not have been evidence against one not claiming in privity with him.

(r) See the judgment of C. J. de Grey, 11 St. Tr. 261.

(s) In *Doe d. Tatham v. Wright*, Lan. Summer Ass. 1836, cor. Coleridge, J., the question was as to the capacity of *M.* to make a will: the defendant, claiming under a supposed will, tendered in evidence a decree in equity dismissing a bill filed by the plaintiff's lessor, Admiral Tatham, to set aside the will, on the ground of fraud and influence alleged to have been exercised by the defendant, also an order to try the issue *devisavit vel non*, the *postea* and verdict finding the *devisavit* with a view to establish the fact in evidence of the former jury having so found. Coleridge, J. on a subsequent day delivered his opinion, that though the decree and *postea* were admissible evidence for the purpose of warranting the admission of the evidence given on the trial of the former issue by witnesses since deceased, those documents were inadmissible to prove the former verdict. The decree, he observed, decides

nothing, it is not conclusive; the question is, whether the verdict be admissible in evidence; as matter of opinion the judgment is unnecessary; but it is not contended that the judgment is unnecessary. The judgment, however, decides nothing, and therefore the verdict on which it is founded decides nothing. The verdict is not severable from the decree as a matter of common law decision, because there is no power of reversing the judgment at common law by motion in arrest of judgment, writ of error, or otherwise; the admission, therefore, of the former verdict as evidence, would tend only to prejudice the inquiry.

The defendant's counsel afterwards insisted that as the *postea* was evidence for one purpose he had a right to have the whole read, upon which Coleridge, J., thought he was in strictness entitled to have it read, and it was read accordingly.

(t) See the *Duchess of Kingston's Case*, 11 St. Tr. 198.

(u) *Plumtree v. Woodhouse*, 4 B. & C. 625.

(x) *Obicini v. Bligh*, 8 Bing. 351.

(y) *Sadler v. Robins*, 1 Camp. 253. And see *Henley v. Soper*, 8 B. & C. 20.

(z) *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 19.

Applica-
tion of the
judgment
in proof.

jurisdiction has adjudicated directly upon a particular matter, the next question is as to the application and effect of that judgment in proof of the same disputed fact. The adjudication is offered to prove either, First, the same fact for the same purpose, that is, where the same matter is again litigated (*a*) in a court of concurrent jurisdiction; or, secondly, to prove the same fact for a different or collateral purpose. In the first case, according to the judgment of Ch. J. de Grey, already cited (*b*), the judgment is as a plea a bar, and as evidence conclusive between the same parties (*c*). In order, however, to make such a judgment operate as a conclusive bar in a civil action merely as an *estoppel*, it is necessary to plead it as an *estoppel* (*d*). If a party will not rely on an *estoppel* when he may, but takes issue on the fact, the jury will not be bound by the *estoppel*, for they are to find the truth of the fact (*e*). They

(*a*) A judgment by default is not evidence by way of admission, where the same cause is removed to a higher court. Upon the removal, by *habeas corpus*, of the cause from the inferior court, the defendant having suffered judgment by default, it was held that it was not receivable in evidence against him as an admission of a cause of action; upon the removal, both parties were to be considered as in the same situation as if no such judgment had been given. *Bottings v. Firby*, 9 B. & C. 762. See *Tidmus v. Lees*, 5 C. & P. 233, where Lord Tenterden received such evidence, but the plaintiff was afterwards nonsuited. So a verdict on a former trial is not evidence on a new trial. 2 Show. 255. But it has been seen that if a party omit to plead that which would have been a bar to the former action, he cannot plead that matter to an action on the judgment. *Todd v. Maxfield*, 6 B. & C. 105; and see above, 257, note (*u*). After a complaint against the sheriff by action, and special relief given, an action is not maintainable against him. *Cameron v. Reynolds*, Cowp. 403. *A cessio bonorum* in Scotland does not discharge the party from a contract in England. *Phillips v. Allen*, 8 B. & C. 477. *Secus*, if the plaintiff be entitled to a distributive share. *Ib.* In the case of a joint and several obligation, a judgment and execution without satisfaction against one, is no bar. 3 Tyr. 466; *Higgins's Case*, 6 Co. 446; *Brown v. Wootton*, Cro. J. 73; Com. Dig. Action, L.4.

Two being liable on a contract, the Statute of Limitation runs: one promises to pay his proportion, a joint action is brought against both, a verdict is found against the party so promising, and a verdict on the general issue for the co-defendant, on a second action brought against the former, on the special promise, the verdict and judgment for the co-defendant are no bar. *Lechmere v. Fletcher*, 3 Tyr. 453.

(*b*) Vide *supra*, 256. 11 St. Tr. 201; Hargr. Law Tracts, 456; Pothier, by Evans, 357; 3 Wils. 304.

(*c*) B. N. P. 244; Stra. 901; 4 Co. 20; 11 St. Tr. 213, 214; Cowp. 322; 8 T. R. 130; Burr. 1005.

(*d*) See the cases cited below, and Com. Dig. tit. *Estoppel*, A. *Outram v. Morewood*, 3 East, 354; 16 East, 334. A plaintiff is estopped by livery of seisin, unless he show by the deed that the delivery was conditional. Co. Litt. 225; Litt. 363. But the jury are not estopped under the general issue. Co. Litt. 226; Litt. 366; see further Vol. II. tit. RECORD. See the Digest, De Exceptione rei Judicatae, 44; tit. 1, 2. The judgment not being pleaded is not conclusive, although the form of action was such (ejectment) that the defendant had no election. *Strode v. Seaton*, 2 C. M. & R.

(*e*) *Vooght v. Winch*, 2 B. & A. 662; *Trevivan v. Lawrence*, Salk. 276; B. N. P. 298; *Hannaford v. Hunn*, 2 Carr. & P. C. 148.

cannot, indeed, find anything against that which the parties have affirmed, and admitted on record, although such admission be contrary to the truth ; but in other cases, though the parties be estopped to say the truth, the jury are not, as in *Goddard's Case* (f), where, in an action upon a bond to a deceased intestate, the defendant pleaded the death of the intestate before the date of the bond, as alleged in the declaration, and so concluded that the writing was not his deed ; on which issue was joined, and it was held that the jury were not estopped from finding that the bond was executed nine months before it bore date, and in the lifetime of the intestate (g).

Effect of a judgment.

In an action on the case for diverting water from the plaintiff's mill, the defendant gave in evidence the record of a judgment in a former action between the same parties for the same cause of action, in which the defendant had pleaded not guilty, and obtained a verdict. It was contended, both at the trial and afterwards in bank, that the plaintiff ought to be nonsuited ; but it was held that it was not conclusive, upon the plea of not guilty, although it would have been so had it been pleaded by way of estoppel, for the defendant had *elect*ed that the matter should be considered by a jury upon *evidence*, and it was left open to them to inquire into the same upon evidence, and to give their verdict upon the whole of the evidence submitted to them. And the case of *Bird v. Randall* (h), where Lord Mansfield was reported to have said that a former recovery need not be pleaded, but will be a bar when given in evidence, was denied ; and it was said that the judgment in a former action for the same cause did not necessarily show that the plaintiff had no cause of action. If the matter had been pleaded it would have operated as an estoppel ; but having put it to the jury to find what the fact was, it was inconsistent with the issue which the defendant had joined, to say that the jury were *estopped* from going into the inquiry. He might, however, use the former verdict as evidence, and pregnant evidence, to guide the jury, who were to try the second cause, to a verdict in his favour ; but if, notwithstanding the prior verdict and judgment, the jury thought the case was with the plaintiff, they were not estopped from finding the verdict accordingly (i).

(f) B. N. P. 298.

(g) 2 Rep. 4.

(h) 3 Burr. 1853.

(i) *Vooght v. Winch*, 2 B. & A. 662. Assuming that the former verdict was founded on evidence as to the right, it is exceedingly

difficult to say what degree of weight in the scale is to be attributed by the latter jury to the opinion of the former, without the means of knowing the reasons which led them to that decision, or how far they are to distrust their own judgment, formed on

When con-
clusive.

The above general rule, that a judgment by a court of competent jurisdiction upon the same matter, between the same parties, and for the same purpose, is conclusive, appears to comprehend not only all adjudications by the courts of this country, whether of record or not, but also those of foreign courts (*k*). It has, indeed, been suggested that the judgments of the courts in this country, which are not of record, afford mere *primâ facie* evidence of the subject-matter to which they relate, and are liable to be controverted by opposite evidence. This position does not, however, seem to be warranted by any decision, or to be tenable upon principle.

Between
parties;
foreign
judgments,
when con-
clusive.

The question, also, whether the judgments of foreign courts, when actions are brought upon them here, are conclusive, or merely *primâ facie* evidence of the debt, has been subject to some doubt, but the former position seems to be best supported both by principle and by analogy to decided cases (*l*). That the evidence in these cases is merely *primâ facie*, is a position which rests chiefly on these authorities: the case of *Walker v. Witter* (*m*), which was

grounds which they do know, in order to embrace that formed on grounds which they do not know. The following observations are taken from Douglas on contested elections:—"It will be remarked that the evidence of a former verdict is generally (except where it is directly conclusive), cautiously to be received by a jury who are to decide on their own conscientious conviction, and not on that of other men. If there was clear and full proof to guide the opinion of a former jury, another jury will be satisfied with like proof; if the evidence before was doubtful in its nature, no verdict will render it otherwise, while the facts remain the same. Perhaps there is among men in general too great proneness to be prejudiced in matters of fact, and even in points of conscience, by the notions or determinations of others who may have been antecedently so prejudiced themselves, instead of attending to their most solemn duty, when called by the nature of the subject to use their own. On the whole, though the verdict of one jury may be evidence to another, and that verdict may vary in its real force, yet generally it seems to be evidence merely admissible; it is wisely limited by the law within very narrow bounds. In proof of an ancient custom

it is very strong." See further, Vol. II. tit. RECORD. In an action for mesne profits, the judgment in ejectment is not, it has been held, conclusive in evidence. *Doe v. Huddart*, 2 C. M. & R. 322.

(*k*) As to the effect of a foreign judgment in discharging a debt contracted in this country, see *Sidaway v. Hay*, 3 B. & C. 12; where it was held that a debt contracted in England was discharged under a sequestration in Scotland, issued under 54 Geo. 3, c. 137. But that was on the construction of the particular statute. See further, *Smith v. Buchanan*, 1 East, 6; *Potter v. Brown*, 5 East, 124; *Peddler v. M'Master*, 8 T. R. 609; *Quin v. Sheu*, 2 H. B. 553; *Jeffery v. M'Taggart*, cited 3 B. & C. 22.

(*l*) Subsequently to the writing these observations, the case of *Martin v. Nicholls*, 3 Sim. 458, has been decided in equity, in which the Vice-Chancellor, after considering the authorities, held, that the grounds of a foreign judgment could not be received in the Courts of this country, and that a bill for a discovery, and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on a foreign judgment in this country, was demurrable.

(*m*) Doug. 1.

an action on a judgment in Jamaica, in which it was observed *incidentally* (n) that courts not of record, or foreign courts, or courts in Wales, have not the privilege of not having their judgments controverted. The case of *Sinclair v. Fraser* (o), which was an action in Scotland upon a judgment in Jamaica, in which the Court required evidence of the original debt, and in which, upon appeal to the House of Lords, it was resolved, that the judgment of a court in Jamaica ought to be received as *prima facie* evidence of the debt. Also a *dictum* of Eyre, C. J., in giving judgment in the case of *Phillips v. Hunter* (p), in which he considered foreign judgments as matters *in pais*, and *prima facie* sufficient to raise a promise. It is to be observed, in the first place, that these authorities are all, with a view to this question, *extra-judicial*. In *Walker v. Witter*, and *Sinclair v. Fraser*, the only question necessary to be determined was, whether on proof of a foreign judgment in his favour the plaintiff was entitled to recover against the defendant, without entering into the original consideration on which the judgment was founded; and the question how far such evidence was controvertible did not arise; and the case of *Phillips v. Hunter* was decided against the opinion of Eyre, C. J., by the three other Judges. Secondly, the position in *Walker v. Witter*, and the observation of Buller, J., in support of it, in a subsequent case (q), proceed upon the supposition that no judgments are conclusive except those of record in this country; and that the judgment of a foreign court could not be entitled to greater credit than the judgment of a court not of record in this country. But this seems to be doubtful at the least. In the case of *Moses v. Macfarlane* (r),

Foreign
judgment.

(n) See Mr. Evans's Observations, 2 Pothier, by Evans, 349.

(o) Cited 1 Doug. 5.

(p) 2 H. B. 402.

(q) *Galbraith v. Neville*, 1 Doug. R. 5, n. 2; and 5 East, n. b.

(r) Burr. 1005. *Macfarlane* sued *Moses* in the Court of Conscience, as the indorser of a small bill of exchange, and recovered against him, in breach of an agreement in writing between them (which the commissioners of the court refused to notice), that *Moses* should not be liable nor prejudiced by reason of his indorsement. *Moses* paid the money, and brought an action in the King's Bench to recover it back, as money had and received to his use, and did recover it. The principal question was, whether the money thus

paid according to the sentence of the Court could be recovered in opposition to that sentence, as money had and received to the plaintiff's use; and whether he ought not to have declared for breach of the special agreement. It was held that the plaintiff was entitled to recover, for that the commissioners had properly refused to take notice of the agreement in bar of the suit; and, therefore, that the permitting the plaintiff to recover money so paid, was no impeachment of their decision; and as it was money which, under all the circumstances, was justly due to the plaintiff, it might be recovered in that form of action. This decision has created great dissatisfaction, and the objections to it were stated with great force and perspicuity by Lord C. J. Eyre, in giving his opinion in *Phil-*

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Judgment.

which has been the subject of strong animadversion on account of its tendency to unsettle foundations (s), the Court fully admitted the general doctrine, that the judgment of a competent tribunal could not be overhauled in an original suit; and although the judgment, which was there insisted upon as final, was one by the commissioners in a court of conscience, it was never contended that it was not equally conclusive with the judgment of a court of record. So in *Moody v. Thurstan* (t), under an Act for stating the debts of the army, the commissioners had power to call the officers and agents before them, and in case they found money due from one to the other, to give a certificate upon which an action might be brought, as upon a stated account; in an action for money so due, the plaintiff produced his certificate; the defendant tendered his accounts, offering to show that no money was due; and he complained that the commissioners had refused to hear him, and made their certificate upon the first summons, without giving him time to produce his accounts: but the Chief Justice upon the trial, and the whole Court afterwards, were of opinion that the certificate was conclusive. So the allowance of a debt by the commissioners of bankrupts is conclusive evidence (u). It is true, that in the case of *Henshaw v. Pleasance* (x), it was doubted whether a condemnation by commissioners of excise was conclusive evidence in justification of the officer who seized the goods, because it was not a judgment of a court of record. But in the case of *Roberts v. Fortune* (y), it was held by Lee, C. J., that such an adjudication, although not of record, was final. So the judgments of the Ecclesiastical Courts (z) and Admiralty Courts (a), although not of record, are frequently conclusive (b). So the decision of a private arbitrator, to whom the parties have referred themselves, is binding upon the subject-matter (c). These are instances in which the

lips v. Hunter, 2 H. B. 402, who observed, that it was beyond his comprehension how the same judgment could create a duty for the recoverer, upon which he might have debt, and a duty against him upon which money had and received would lie.

(s) See the observations of Eyre, C. J., in *Phillips v. Hunter*, 2 H. Bl. 416. See also *Brown v. M'Kinnally*, 1 Esp. C. 279; *Marriott v. Hampton*, 7 T. R. 269; 2 Pothier, by Evans, 350.

(t) Str. 481.

(u) Doug. 302.

(x) 2 Bl. 1174.

(y) 1 Hargr. Law Tracts, 446.

(z) *Da Costa v. Villa Real*, Str. 961.

(a) Vide *infra*, 241. 243.

(b) In the case of *Gahan v. Mainjay*, cited 2 Evans's Pothier, p. 350, the Lord Chancellor (of Ireland) observed, that the Ecclesiastical and Admiralty Courts are not courts of record, and that sitting in a court of law, he was not at liberty to enter into the examination of the justice or injustice of any judgment of a court of competent jurisdiction, unless it came before him by writ of error.

(c) *Doe v. Rosser*, 3 East, 15; 16 East, 208; *Barrett v. Wilson*, 1 C. M. & R. 586; *Johnson v. Durant*, 2 B. & Ad. 930; *Jupp v. Grayson*, 1 C. M. & R. 523.

adjudication, though not of record, is final. A matter is not less *res adjudicata* because it is not of record, that is, because it is not preserved and authenticated in a particular manner; and when it has been established as a legal judgment by a court of competent jurisdiction, it seems to be equally entitled to consideration (*d*). The principle on which the conclusive quality of judgments, decrees or sentences depends, applies just as much to foreign judgments attempted to be enforced here, as to any other. Judgments of inferior courts in this country do not differ in that respect from recorded judgments; and if the mere circumstance of their being foreign made any difference, the objection would equally apply to all foreign judgments, and consequently the sentences of foreign courts of Admiralty would not be, as they are, conclusive here. The principle upon which a judgment is admissible at all is, that the point has already been decided in a suit between parties or their privies, by some competent authority, which renders future litigation useless and vexatious. If this principle extends to foreign as well as domestic judgments, as it plainly does, why is it to be less operative in the former than in the latter case? If it does not embrace foreign judgments, how can they be evidence at all? By admitting that such judgments are evidence at all, the application of the principle is conceded: Why, then, is its operation to be limited as if the foreign tribunal had heard nothing more than *ex parte* state-

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(*d*) It will be seen that decisions by justices of the peace by virtue of a summary jurisdiction are conclusive on an action brought, and that the propriety of such decisions cannot be questioned. See Vol. II. tit. JUSTICES. In the case of *Guinness v. Carroll*, 1 B. & Ad. 459, an action having been brought upon an Irish judgment, the attempt was made to unravel the former proceedings, but the case was decided on a collateral ground. It is observable, however, that on the case of *Buchanan v. Rucher*, 9 East, 192, being cited as an authority to warrant such inquiry, Lord Tenterden observed, that in that case the proceedings showed that judgment had been given by default upon summonses not personally served, where it did not appear that the defendant ever had been summoned. The cases of *Arnott v. Redfern*, 3 Bing. 353, and of *Douglas v. Forrest*, 4 Bing. 686, were also cited on the same side. But in the former, Best, C. J., in giving judgment, observed, that it

was not necessary to consider whether the judgment (of a Scottish court) could be impeached here; and in the latter, the question was, not whether the former judgment could be examined into with a view to the merits, but only whether the process of the Scotch Court, in which the judgment had been pronounced was sufficient to make the judgment binding on the defendant. In the case of *Barnes v. Winckler*, 2 C. & P. 345, the plaintiff having sued for his debt in the county court, and the plaint having been dismissed on the merits, it was held that he might still sue in a superior court for the same demand, that the former proceedings would not be conclusive against him, but were for the consideration of the jury, as something might have occurred in the county court which was not brought before the jury in the second action. But see the case of *Huxham v. Smith*, 2 Camp. 19, *infra*, 277.

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ment and proof? Lord C. J. Eyre lays stress on the circumstance, that the judgment is voluntarily submitted by the party who claims the benefit of it, to the jurisdiction of the court; but so it is in every case where a party claims the benefit of such a judgment, for no one is compelled to avail himself of a judgment; and it can make no difference whether he attempts to enforce it as plaintiff, or as matter of defence; for it could scarcely be contended that a judgment was merely *primâ facie* evidence for a plaintiff who endeavoured to recover the debt, but that it was conclusive in his favour when he used it by way of set-off. In the case of *Galbraith v. Neville*, Lord Kenyon expressed strong doubts as to the doctrine advanced in *Walker v. Witter*; and it appears that ultimately (e) the Court refused a new trial, being of opinion that the judgment was at all events *primâ facie* evidence of the debt, without entering into the question how far it was impeachable.

Upon an action of covenant (f), for not indemnifying the plaintiff against partnership debts due from a dissolved firm in which the plaintiff and defendant were partners, the plaintiff proved a decree in the court of Grenada against himself and the defendant, for a partnership debt, on which a sequestration issued against the plaintiff's property, by which he was compelled to pay the debt. Upon the trial the defendant offered to prove that the account had been incorrectly taken; but Lord Ellenborough rejected the evidence on the ground that the foreign court, being a court of competent jurisdiction, must be taken to have decided rightly, and the Court of King's Bench afterwards refused a rule *nisi* for a new trial. The case of *Burrows v. Jemino* (g) is direct to show that foreign judgments are conclusive. In that case, the acceptor of a bill, residing at Leghorn, having been discharged of his acceptance, according to the laws there, by the failure of the drawer, instituted a suit there, and had his acceptance vacated by a decree of the court; and being afterwards sued in England upon the same bill, he applied to the Court of Chancery for an injunction, which was granted on the broad ground that the sentence of a court of competent jurisdiction is conclusive.

(e) 5 East, 475 (n.) b.

(f) *Tarleton v. Tarleton*, 4 M. & S. 20. See *Malony v. Gibbons*, 2 Camp. 502.

(g) Str. 733. In the case of *Plummer v. Woodhouse*, 4 B. & C. 625, it was held that a plea alleging a judgment in a colonial

court for the same cause of action, was a bad plea, for not showing that such a judgment would have been conclusive in the colony; but it seems to have been assumed that the judgment, if shown to be conclusive in the colony, would also be conclusive here.

In the late case of *Martin v. Nicolls* (h), a bill for a discovery and commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on a foreign judgment in this country, was, after an examination of the authorities, held to be demurrable, on the broad principle that the grounds of a foreign judgment cannot be raised in the courts of this country. It may not, therefore, be going too far to say, that the doubts which have rested on this important question, and on which it has been seen that eminent authorities have differed, are now set at rest; and that it may be laid down as a general position, that the decisions of foreign courts, which being apparently regular, and free from error on matters within the scope of their jurisdiction, are conclusive in the court and country in which they are pronounced, are also conclusive in this country.

Where, however, a foreign judgment has proceeded upon some error apparent on the face of the judgment, it is impeachable on that ground. In the case of *Novelli v. Rossi* (i), the defendant, in answer to proof of a debt due by him to the plaintiff, showed that he had indorsed two bills to the plaintiff, of which the defendant himself was also the indorsee; that the acceptance on these bills had, on presentment for payment, been cancelled by the banker's clerk, who immediately wrote opposite to them, "cancelled by mistake;" that the plaintiff afterwards took up the bills, and returned them, regularly protested, to the defendant, who applied, without success, to the prior parties for payment; that a suit having been instituted by him in a French court, to which the plaintiff had been cited, the court adjudged (and afterwards a court to which the plaintiff had appealed adjudged) that the defendant was discharged from the bills, on the ground that the cancelling of the bills operated as a suspension of the legal remedies against the acceptor, and was equivalent to a delay granted to him by the holder, with whom the plaintiff was identified. It was contended that this decree was conclusive, but the Court held that as it appeared that the French courts had mistaken the law of England as to the effect of the cancellation (j), the defendant was still liable. The courts of England will not, however, for obvious reasons, set aside the judgment of a court of a foreign country, for a mistake of the law of that country, unless the error be very manifest (k).

(h) 4 Sim. 458.

(i) 2 B. & Ad. 757. See also the observations of Lord Ellenborough in *Buchanan v. Rucker*, 1 Camp. 67.

(j) As to this point, see also *Raper v.*

Birkbeck, 15 East, 17. *Wilkinson v. Johnson*, 3 B. & C. 428.

(k) *Becquet v. M'Carty*, 2 B. & Ad. 957. *Atison v. Furnival*, 1 C. M. & R. 293.

Foreign judgments, how far examinable.

The proceedings upon which a foreign judgment has been obtained, are also, to a certain extent, open to examination, for the purpose of ascertaining whether the judgment has been fairly obtained, and pronounced by proper authority, in a case within the jurisdiction of the court.

Thus, where the plaintiff declared in *assumpsit* on a foreign judgment in the island of Tobago (*l*), and upon the trial a copy of the proceedings and judgment was produced, from which it appeared that the defendant had been summoned by nailing up a copy of the declaration at the court-house door, upon which judgment was afterwards given by default, and no evidence was given that the defendant had ever been present in the colony, or subject to the jurisdiction of the colonial court, Lord Ellenborough nonsuited the plaintiff, and a rule *nisi* for a new trial was afterwards refused (*m*). So in the case of *Cavan v. Stewart* (*n*), Lord Ellenborough held that a party here was not bound by a colonial judgment, unless it appeared that he had been summoned, or was proved that he had been once resident upon the island; and that it was not sufficient that he was described as an absentee on the face of the proceedings.

Where a party, once resident in a colony, absented himself from it without leaving any attorney, but where it was the duty of the procurator fiscal to take care of the interests of an absentee, the judgment was held to be binding (*o*). Credit will be given to facts specifically alleged: where the judgment (by default) stated that the defendant appeared by attorney, it is to be presumed that he had authority to appear for the defendant (*p*).

It seems to be a general rule with respect to foreign judgments, which are not unfrequently inaccurately expressed, to regard their substance, and not their form, and this is according to the rule adopted by the Privy Council (*q*).

(*l*) *Buchanan v. Rucker*, 9 East, 192. And see Lord Tenterden's observation on this case in *Arnott v. Redfern*, 3 Bing. 353.

(*m*) It appeared that, by a law of the colony, if a defendant be absent from the island, and have no attorney, manager or overseer there, such mode of summoning should be deemed good service. But the Court held, 1st, That the law applied to those only who had once been present upon the island; and, 2dly, That if its terms could be construed to extend to those who had never been present, the law could not

be operative upon them. And see the case of *Cavan v. Stewart*, 1 Starkie's C. 525, and of *Douglas v. Forrest*, 4 Bing. 686, *Frankland v. M'Gusty*, 1 Knapp. Pr. C. 274. *Olivier v. Bligh*, 8 Bing. 35.

(*n*) 1 Starkie's C. 525.

(*o*) *Becquet v. M'Carthy*, 2 B. & Ad. 958. So an action lies on a Scottish judgment of homing; *Douglas v. Forrest*, 4 Bing. 693.

(*p*) *Malony v. Gibbons*, 2 Camp. 503.

(*q*) Per Lord Tenterden in *Henley v. Soper*, 8 B. & C. 20.

The rule (as to examining previous proceedings) appears to be the same with respect to the judgments of inferior courts in this country. In *Fisher v. Lane* (r), the plaintiff, an administrator, brought *assumpsit* for goods sold and delivered by the intestate; the defendant pleaded the general issue, and gave in evidence the payment of a sum of money in consequence of a judgment upon a foreign attachment in London. From the minutes of the judgment, it appeared that Henry Janson had by this process attached the sum of 92*l.* 18*s.* in the hands of the defendant, for a debt due from the intestate, and for default of the present plaintiff in not appearing, had had execution; but it did not appear from the proceedings that the plaintiff had received any notice of the process, and the serjeant-at-mace stated that such was the custom of the city court. The Court of Common Pleas held that the judgment was erroneous, since the plaintiff, who never had been summoned, had made no default (s).

Judgments of inferior courts, how far examinable.

A judgment and process of execution in a county court being pleaded in bar of an action of trespass, it was held that the jury were at liberty to consider the whole of the proceedings fraudulent and collusive, no process having been served, or appearance entered, although a motion to set aside the proceedings of the court below had been made without effect (t).

It is also to be observed, that error or insufficiency, manifest on the face of the proceedings, before courts of inferior jurisdiction, may usually be objected, even where the conviction or adjudication is offered in justification of some act done under its authority (u).

Secondly, where a judgment is offered to prove the same fact,

In private matters, conclusive effect of.

(r) 3 Wils. 297. In *Herbert v. Cooke*, Willes, 36, note (a), it was held that in an action of debt, on a judgment of an inferior court, not of record, the defendant might plead that the cause of action arose beyond the jurisdiction of the court. In *Huxham v. Smith*, 2 Camp. C. 19, Lord Ellenborough held that the judgment against the defendant as garnishee in the Lord Mayor's court was *prima facie* evidence of a debt due to the plaintiff from the defendant on a cause of action, within the city of London; but he admitted evidence to prove the contrary. See *Palmer v. Hooker*, 1 Ld. Ray. 727. But he held that the judgment was conclusive as to the debt.

(s) See also *Williams v. Lord Bagot*, in error, 3 B. & C. 772; where it was held

that a custom in an inferior court to declare against a defendant before an appearance entered by him, or by some person for him, was bad in law: and it seems also that a custom to issue a summons and attachment at the same time, is also bad. See also *Doe d. Lord Thanet v. Gartham*, 1 Bing. 357. *R. v. Dr. Gashin*, 8 T. R. 209. *Pratt v. Dixon*, Cro. J. 108. *Ward v. Ellayn*, ib. 261.

(t) *Thompson v. Blackhurst*, 1 Nev. & M. 273.

(u) As in the case of a summary conviction before a magistrate; see the cases collected, Vol. II. tit. JUSTICES. It would probably be different in the case of a judgment in a court of record, which, though erroneous, is in force till it is reversed.

In private matters, conclusive effect of.

but for a different or collateral purpose, then if the judgment was by a court of exclusive jurisdiction, it is *conclusive* evidence upon the question so incidentally arising (*x*). In an action upon a contract of marriage, *per verba de futuro*, the defendant gave in evidence a sentence of the Spiritual Court in a cause of contract, where the Judge had pronounced against a suit for the solemnization in the face of the church, and declared the defendant free from all contract, and this was held to be conclusive evidence although the proceedings were *diverso intuitu*; that in the Spiritual Court being for a specific performance, and that in the action for damages (*y*).

In the next place, although the judgment or decree be not pronounced by a court of exclusive jurisdiction upon the subject-matter, yet, if the same point once determined between the same parties again arise, although for a different purpose, the judgment, it seems, would be admissible but not conclusive evidence (*z*).

Verdicts and judgments in criminal cases, admissibility of.

An adjudication of a criminal nature seems to have little operation as evidence, except with a view to proof of the mere fact of adjudication, or to establish its own legal consequences.

The principles adverted to seem to exclude a verdict in a criminal proceeding from being evidence in one of a civil nature. For, independently of other objections in such cases, the parties are not the same; and, therefore, there is not such a mutuality as is essential to an estoppel (*a*).

In an action brought by a private person, the *acquittal* of the defendant upon an indictment is not evidence, because the plaintiff was no party to the criminal proceeding, and therefore his private remedy ought not to be concluded by the result (*b*). In addition to which it may be observed, that an acquittal, however well founded, would seldom, if ever, show conclusively that the defendant had not committed an injury for which he is responsible in damages; for he may be liable in damages without having acted criminally; *è converso*, a *conviction* upon an indictment is not evidence for the plaintiff in an action for the same wrong: *first*, because the defendant upon the indictment could not attain the jury for a false verdict; and, *secondly*, because there is no mutuality; *thirdly*, because

(*x*) According to the judgment of De Grey, C. J. *antea*, 256. And see *Da Costa v. Villa Real*, Str. 961.

(*y*) *Da Costa v. Villa Real*, Str. 961.

(*z*) *Lewis v. Clarges*, Gil. Law. Ev. 20. A judgment in replevin, on the plea of *non tenet* to a cognizance for rent arrear, is admissible evidence in an action for rent. *Hancock v. Welsh*, 1 Starkie's

C. 347. Debt on bond, plea usury, the judgment in an action by the defendant against the plaintiff for penalties, is admissible in evidence for the plaintiff. *Clive v. Powell*, 1 M. & R. 228.

(*a*) B. N. P. 232; Gil. Law. Ev. 30. *Hudson v. Robinson*, per Lord Ellenborough, 4 M. & S. 476.

(*b*) *Supra*, p. 261.

it does not appear that the verdict was not procured by means of the testimony of the *interested* party (c). Accordingly, a conviction upon an indictment for trespass is not evidence upon an action brought for the same trespass (d); and a conviction upon an indictment for a conspiracy is not binding upon a writ of conspiracy by the same party (e). But where, upon an indictment, the defendant *confesses* his guilt, the confession, it seems, is evidence in a civil proceeding (f), since those objections do not apply; for the record does not rest upon the testimony of any interested witness; and an attain is out of the question. It has been laid down, that a conviction in a court of criminal jurisdiction is conclusive evidence, if the same fact afterwards come collaterally in controversy in a court of civil jurisdiction (g). And, therefore, that the conviction of the father upon an indictment for bigamy would be conclusive in ejectment as to the validity of the second marriage, although an acquittal would be no proof of the reverse. In support of this position no authority is cited except that of *Boyle v. Boyle* (h); but the question there was, whether a prohibition should not be awarded in a jactitation suit, the complainant in that suit having been convicted of bigamy in marrying a second wife, whilst his first wife, the defendant in the jactitation suit, was living; and a prohibition was granted. Admitting this decision to be law, it can scarcely be inferred that the conviction would have been equally conclusive of civil rights in a temporal court. An action was brought for words which charged the plaintiff with being accessory to felony; and though the party charged as principal in the felony had been acquitted, it was held that the defendant was at liberty to go into evidence to prove his guilt, because what had passed between others could not affect him (i).

Verdicts and judgments in criminal cases, admissibility of.

(c) In Gil. Law Ev. 31, it is urged, that where the verdict is founded on other evidence besides the party's own oath, it is admissible; but how are the jury to know what weight the oath of the party had, and how is it to be known without going into extrinsic evidence, by what witnesses, or upon what evidence, the former verdict was obtained?

(d) *P. C. Sampson v. Toothil*, 1 Sid. 324; *B. N. P.* 233; *Hob.* 53. *Jones v. White*, Str. 68.

(e) 27 Ass. 13; Tr. per Pais, 30.

(f) Such evidence is warranted by the old authorities. See *Lamb's Inst. B.* 2, c. 9; 9 H. 6. 60, 11 H. 4. 65; Tr. per Pais. 30; 27 Ass. 7. The reason given by

Sharde is, that a confession is stronger than a verdict. In such a case, the objection, that the verdict may have been obtained on the evidence of the party who now seeks to take advantage of it, ceases; and the case seems to stand upon the same footing with that of any other admission; and so ruled by Wood, B., Leicester Lent Assizes, 1808. But see *Phillips's L. E.* vol. 1, p. 523, where it is stated that Lord Tenterden doubted as to the admissibility of such evidence.

(g) *B. N. P.* 245.

(h) 3 Mod. 164; Comb. 72. S. C.

(i) *England v. Bourke*, 3 Esp. C. 80. An acquittal of a party by the judgment of a court-martial from the charge on

Verdict in
criminal
case not
evidence in
civil action.

As a general rule, it seems that a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding.

The case of *The King* against *The Warden of the Fleet* (k) is a strong authority for this position. The defendant was tried at bar for permitting the escape of prisoners from the Fleet prison. To prove the escape a witness was offered who had been a prisoner. It was objected that he was incompetent, since he had given a bond for his being a true prisoner, which he had forfeited by his escape; and besides that, he had been retaken; and that if the defendant should be convicted upon his evidence, and debt should afterwards be brought by him upon the bond, the conviction would be evidence to make it void, as taken for ease and favour; and that in an action of false imprisonment for the retaking, the conviction would also be evidence. But it was answered, and resolved by the Court, that the conviction would be no evidence against the warden upon debt on the bond, nor for the prisoner in false imprisonment against the warden; because it would not be between the *same parties*. For a conviction at suit of the King for battery, &c. cannot be given in evidence in an action of trespass for the same battery nor *vice versâ*, the like law of an usurious contract. In the case of *Hillyard v. Grantham* (l), upon a trial at bar, the Court of King's Bench were of opinion that a sentence of excommunication against the father and mother for fornication was not admissible in evidence upon an ejectment to bastardize the issue, because it was a *criminal matter*, and therefore could not be admitted in a civil cause; and also because it was *res inter alios acta*. And in the case of *Gibson v. Macarty* (m), where the question was whether certain promissory notes were genuine, the defendant offered in evidence the record of the plaintiff's conviction for the forgery of one of the notes; but Lord

which he was arrested, does not deprive the defendant, in an action of trespass for the arrest, of his right to justify, on the ground that there was reasonable and probable cause for the imprisonment. *Bayley v. Warden*, 4 M. & S. 400.

(k) 12 Mod. 337. See also the cases of *R. v. Boston*, 4 East, 581; and *Bartlett v. Pickersgill*, ib. 377, in which the principle is fully established, that a conviction obtained on the oath of an interested party is of no effect. See also *Hathaway v. Barrow*, 1 Camp. 151, where Sir J. Mansfield held, that in an action on the case for a conspiracy, a conviction of the defend-

ants upon an indictment, where the plaintiff was a witness, was not evidence. A conviction is not evidence for the informer, though his name do not appear on the face of the proceedings. *Smith v. Rummens*, 1 Campb. 9; S. P. ruled in *Hathaway v. Barrow and others*, 1 Campb. 151. See also *Burden v. Browning*, 1 Taunt. 520. *Richardson v. Williams*, 12 Mod. 319. *Gibson v. M'Carty*, Cas. temp. Hardw. 311. *Hillyard v. Grantham*, cited by Lord Hardwicke in *Brownsword v. Edwards*, 2 Ves. 246.

(l) Cited Ca. temp. Hard. 311.

(m) Ibid.

Hardwicke refused to admit the evidence, on the ground suggested by the plaintiff's counsel, viz. that no record of a conviction could be evidence in a civil suit, because it might have been obtained by the evidence of a party interested. And the same doctrine is reported to have been expounded by the Court in the case of *Richardson v. Williams* (n). In the case of *The King v. Boston* (o) it was held, on an indictment for perjury, assigned upon an answer to a bill of injunction, that the prosecutor, against whom the defendant had brought the action at law, was a competent witness, on the express ground that the conviction could not be used by him for the purpose of obtaining relief in equity.

Verdict in a criminal case not evidence in a civil action.

The main objection to the reception of such evidence is that there would be no mutuality; for an acquittal of a party on a criminal proceeding would not be available in a civil action (p). Where the father was acquitted on an indictment for having two wives, it was held that the record was not evidence in a civil case, where the validity of the second marriage was controverted (q). On this ground it is asserted in Buller's *Nisi Prius* (r), that a conviction at the suit of the King for a battery, cannot be given in evidence in trespass for the same battery.

The record of an acquittal or conviction upon a criminal charge, is in general pleadable in bar, or conclusive evidence upon another indictment or other proceeding for the same offence. The parties

Judgment in criminal cases, effect of in evidence.

(n) 12 Mod. 319; and see *Jones v. White*, Str. 68, where the question was, whether upon the issue *devisavit vel non*, the coroner's inquest, finding the deceased a lunatic, was admissible in evidence; and the Judges were divided upon the question of admissibility. But Eyre and Pratt, Js. were for excluding the evidence, because the proceeding was of a criminal nature, and therefore was not admissible in a civil proceeding. And the Chief Justice, and Powys, J., thought it admissible, on the special ground, that since the plaintiff was executrix, the inquest which saved the personal estate, was to her advantage. And see *R. v. Bowler*, Vol. II. tit. WILL.

(o) 4 East, 581. See also *Bartlett v. Pickersgill*, 4 East, 377. *Burdon v. Browning*, 1 Taunt. 520.

(p) Gil. L. Ev. 35; B. N. P. 232, 3. See Lord Ellenborough's observations, *Hudson v. Robinson*, 4 M. & S. 479; 12 Mad. 339; Hardr. 472; 11 St. Tr. 462. Bac. Ab. Ev. F. 216. In *Blakemore v.*

The Glamorganshire Canal Company, 2 C. M. & R., Parke, B., observed as to the cases there cited, that although the Judges, in noticing the objection to the reception of such evidence, that the verdict might have been obtained upon the evidence of the party seeking to avail himself of it, they were only assigning one reason which existed in the particular cases, instead of relying on the general principle. An estoppel is always reciprocal. *Gaunt v. Wainman*, 2 Bing. N. C. 89; Gil. Ev. 28; B. N. P. 232.

(q) The reason assigned for this is, that less evidence is necessary to maintain the action than to attain the criminal, and therefore his acquittal was no argument that the fact was true. Gil. L. Ev. 33.

(r) 233. So a conviction of an assault before a magistrate, on the information of the party assaulted, is not evidence in an action for the assault. *Smith v. Rummen*, 1 Camp. 9. See also *Hathaway v. Barrow*, 1 Camp. 151; 1 Taunt. 520.

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dence.

are the same in both, and no one ought to be brought into jeopardy twice for the same charge (s). Upon this ground it has been held, that a person who had killed another in Spain, and had been tried and acquitted by a competent tribunal there, could not be tried again here for the same offence (t).

An *acquittal* upon an indictment for the non-repair of a road, is not conclusive evidence upon a subsequent indictment as to any particular point, since it concludes nothing as to the general liability, but only shows that the defendant was not liable at the particular time laid in the former indictment (u). But a *conviction* in such case is conclusive as to the liability, unless fraud can be shown (x). The record of a conviction is conclusive evidence against the inhabitants of a particular district of their obligation to repair a road, unless they can show that it was obtained by fraud (y). Fraud is put by way of example (z), for as against the parish at large the judgment is inconclusive, if the defence was conducted by the inhabitants of a particular district in which the indicated road lay, without any notice to the rest of the parish (a). So upon an indictment against a parish consisting of several districts, one of which pleaded a custom for the inhabitants of each of the three districts to repair their own roads, independently of each other, which custom was traversed, the prosecutor having upon the trial proved records of conviction of the parish at large (upon not guilty pleaded), for not repairing roads lying in the particular districts; the defendants were permitted to adduce evidence that such pleas were pleaded without their knowledge (b).

A penal
judgment is
conclusive
as to all
legal con-
sequences.

The record of a judgment in a criminal case, (as in all other cases), is in general conclusive evidence as to the fact of the con-

(s) 4 Co. 40; 2 Haw. c. 35, s. 1. See B. N. P. 243; 1 Sid. 325.

(t) *Hutchinson's case*, 1 Show. 6; B. N. P. 245. See Vol. II. tit. FOREIGN LAW.

(u) A new trial will not be granted after an acquittal on an indictment for not repairing a road. *R. v. Burbon Inh.* 5 M. & S. 302. Per Lord Kenyon, *Rex v. St. Pancras*, Peake's C. 219. Qu. & vide Vol. II. tit. HIGHWAY. An acquittal which does not, like a conviction, ascertain facts, is no proof of the reverse. B. N. P. 245; Gill. Evid. 32.

(x) Although a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it come collaterally

in controversy in a court of civil jurisdiction, yet an acquittal does not prove the reverse, because it does not ascertain the facts. Per Buller, J., B. N. P. 245.

(y) *R. v. St. Pancras*, Peake's C. 219. Note, that Lord Kenyon held it in the above case to be conclusive on an indictment against another parish. The question however was between the indicted parish and the parish of Islington, the convicted parish.

(z) See the note, 2 Saund. 159, a. See also *R. v. Eardisland*, 2 Camp. 494.

(a) Doug. 421, 3d edit. *R. v. Townsend*, *R. v. Leominster*; see 2 Will. Saund. note 159, a.

(b) *R. v. Eardisland*, 2 Camp. 494.

viction and judgment, and as to all legal consequences resulting from it.

A penal judgment is conclusive as to all legal consequences.

A judgment in a criminal proceeding is in the nature of a judgment *in rem*; such a judgment standing unreversed is, with some exceptions, conclusive evidence as to all its consequences. Thus an accessory to a felony, notwithstanding the judgment against his principal, is entitled to controvert his guilt in evidence. In this case, although the conviction of the principal may be alleged in the indictment against the accessory, or may be given in evidence (c); it is in effect but *prima facie* evidence (d). But this is perhaps the only case in which a judgment founded on a verdict is not conclusive as to the attainder of the principal (e). For a judgment in a criminal matter, as far as regards all the consequences of the judgment, is binding upon all; the attainder of a criminal is, as long as it remains in force, conclusive upon all claiming from or through the party attainted (f). And a conviction of a crime which deprives the party of competency, is conclusive against one who had an interest in his testimony (g).

Upon the same grounds, decisions in the inferior courts of justice, convictions by magistrates, and indeed all other legal and authorized adjudications, as, for instance, sentences of expulsion by colleges, or of deprivation by visitors, are evidence to establish the fact that such an adjudication has taken place, and with a view to establish all the legal consequences that may be derived from it, one of which is the protection of the party who acted in a judicial capacity within the limits of his judicial authority.

Judgments and convictions in inferior courts.

Where actions are brought against magistrates and others, in consequence of what has been done under a conviction for any

Convictions by justices.

(c) But note, that in *R. v. Turner*, Mood. C. C. L. 347, it is stated that many of the Judges (all the Judges except two being assembled) were of opinion that the record of the conviction of the principal would not be evidence of the fact, where the indictment against the accessory alleged not the conviction but the guilt of the principal.

(d) *Fost.* 364, 5. *R. v. Smith, Leach*, 288. See tit. ACCESSORY. One reason for this is, that the witnesses against the principal may be dead, or cannot be procured; but the main reason appears to be, that as to the attainder of the principal, the proceeding is *in rem*, and in general conclusive against all the world as to all the consequences of the attainder. Although an

accessory, as a receiver, may controvert the guilt of the alleged principal, yet the record of conviction of the principal, upon his pleading guilty, is *prima facie* evidence of the principal felony as against the accessory. *R. v. Blick*, 4 C. & P. 377.

(e) *Qu.* whether this is not admitted in *favorem vite*, for it is not necessary that the indictment should aver the guilt of the principal. *Foster*, 365. It is sufficient to allege the conviction simply. See *Fost.* Disc. 3, c. 2.

(f) Where it is founded upon a *verdict*, an alienee cannot falsify the attainder by suggesting that there was no felony committed. 1 *Hale*, 361; 2 *Hawk. c.* 50. s. 2.

(g) See WITNESS.

Convictions
by justices.

offence within their jurisdiction, the proceedings themselves, if regular, are evidence of the fact on which the judgment was founded; and the plaintiff is not at liberty to controvert and disprove it by evidence (*h*). In an action for trespass and false imprisonment, the defendant gave in evidence a conviction by him, as a magistrate, of the plaintiff, for unlawfully returning to a parish after removal from it, and a warrant, reciting the conviction, requiring the keeper of the house of correction to keep him to hard labour for twenty-six days; and Yates, J., held that the conviction could not be controverted in evidence, and the plaintiff was nonsuited (*i*). For although the magistrate may have formed an erroneous judgment upon the facts, that is properly the subject of an appeal; and therefore, where an appeal lies, no action can be maintained till the merits have been heard, and the conviction quashed (*j*). Whenever a magistrate assumes a more extensive jurisdiction than belongs to him (*k*), he is liable in an action; and if the excess of jurisdiction appear on the face of the proceedings, the conviction cannot be set up as a defence to the action, although it has never been formally quashed (*l*). But where the proceedings are regular and formal, and the conviction

(*h*) *Fuller v. Fotch*, Holt, 287. In *Wilson v. Weller*, 1 B. & B. 57, it was held, that a magistrate's order for the payment of wages to a servant, stating a complaint upon oath, and an examination on oath, precluded the plaintiff, in replevin, from pleading, in bar of a plea of cognizance, that the complaint was not made upon oath. What Judges of the matter have adjudged is not traversable. Per Holt, C. J., in *Groenvelt v. Burrell*, Salk. 396. But if a constable commit a man for a breach of the peace, his power is traversable, for he is not a Judge; he acts not for punishment, but for safe custody. *Ibid*. If a justice of the peace record that upon his view, as a force, which is not a force, he cannot be drawn in question either by action or indictment. 12 Co. 23; 27 Ass. 19; Salk. 397. Neither an indictment nor an action lies against a Judge for what he does judicially, and for what he has jurisdiction to do if the circumstances warrant it. *Hammond v. Howell*, 1 Mod. 184; 2 Mod. 218. *Bushell's Case*, Vaugh. 146; 1 H. 6, 64; 47 E. 3, 50. See Vol. II. tit. JUSTICES—TRESPASS.

(*i*) *Strickland v. Ward*, 7 T. R. 633. And see *Fuller v. Fotch*, Holt, 287; Carth. 346; Hardr. 478; Cro. Car. 395; 1 Vent. 273.

(*j*) *Fuller v. Fotch*, Holt, 287; 7 T. R. 631; 2 B. & P. 391; 12 East, 81; 16 East, 21.

(*k*) *Cripps v. Durden*, Cowp. 240. *Gray v. Cookson*, 16 East, 21. *Hill v. Bateman*, 2 Str. 710. *Morgan v. Hughes*, 2 T. R. 225.

(*l*) For instances in which magistrates have been considered to exceed their jurisdiction, see *Hill v. Bateman*, 2 Str. 710, where the magistrate committed the party to prison, although he had effects which might have been distrained upon. Where an overseer under the st. 17 G. 2, c. 38, s. 2, was committed to the common gaol until he had given up *all and every the books* concerning his said office of overseer, belonging to the said parish, the information mentioning one specific book only, it was held that the commitment and adjudication which it pursued were an excess of jurisdiction. *Groome v. Forrester*, 5 M. & S. 314. Vol. II. tit. JUSTICES—CONVICTION.

still subsists, it seems that the plaintiff cannot go into any evidence in order to show that in the particular case the defendant had no jurisdiction (*m*). Upon trespass brought against the defendants, who were justices, they proved a conviction by them of the plaintiff, for a misdemeanor in his service as an apprentice. The plaintiff, in order to rebut this, offered to prove that the indentures had previously been avoided, and this proof being rejected, he was nonsuited; and upon a motion to set aside the nonsuit, the Court were of opinion that upon the point of jurisdiction the plaintiff was confined to such objections as appeared on the face of the conviction (*n*).

Convictions
by justices.

Upon the same principle, it has been held, that upon an indictment for an assault in turning the prosecutor out of a college, the sentence of expulsion is conclusive evidence of the fact of expulsion (*o*). And that a sentence of deprivation by a visitor of a college, is conclusive evidence of the fact of deprivation, in an action of ejectment for one of the college estates (*p*). Such sentences are, however, impeachable for want of jurisdiction (*q*).

Sentences
by colleges
and visi-
tors.

Thirdly, the admissibility of a judgment, decree or verdict, is to be considered, where it is allowed to operate as evidence against strangers to the original suit, the proceeding being, as it is technically called, *in rem*: for there it may be evidence against one who was not a party to the suit, and who does not claim in privity with a party. This happens where a court exercises a peculiar jurisdiction, which enables it to pronounce on the nature and qualities of particular subject-matter of a public nature and interest, independently of any private party (*r*).

Judgments
in rem.

This class comprehends cases relating to marriage and bastardy, where the Ordinary has certified; sentences relating to marriage and testamentary matters in the Spiritual Court; decisions of courts of Admiralty, judgments of condemnation in the Ex-

(*m*) *Gray v. Cookson*, 16 East, 21. See also *Mann v. Davers*, 3 B. & A. 603. Vol. II. tit. JUSTICES.

(*n*) *Ibid*.

(*o*) *R. v. Grundon*, Cowp. 315.

(*p*) *Phillips v. Bury*, Skinn. 447; 2 T. R. 346; 1 Ld. Raym. 5; and see *Dr. Patrick's Case*, 1 Lev. 65. *Case of New College*, 2 Lev. 14. *Dr. Wedrington's Case*, 1 Lev. 23. *R. v. Bishop of Chester*, 1 Bl. 22. *Bishop of Ely v. Bently*, ib. 85.

(*q*) *Doe v. Haddon*, 3 Doug. 310. So,

although the sentences of courts martial are conclusive in actions at law, yet the courts of law will examine whether they have exceeded their jurisdiction. *Case of the ship Bounty*, 1 East, 313. *Grant v. Gould*, 2 H. B. 69. *Stratford's Case*, 1 East, 313, and see the Mutiny Acts.

(*r*) A commission of bankruptcy is a proceeding to which all the world are parties. Per Lord Ellenborough in *Gervis v. Westminster Canal Company*, 5 M. & S. 78.

Judgments
in rem.

chequer, and adjudications upon questions of settlement. Here the general rule is, that such a judgment, sentence, or decree, provided it be final in the court in which it was pronounced, is evidence against all the world, unless it can be impeached on the ground of fraud or collusion (s). This seems to be built upon one or both of the following considerations: First, Because it is essential to the practical efficacy of such a jurisdiction that its judgments should be binding in all courts; Secondly, Because all who are interested in the result may usually become parties to the proceeding. First, The jurisdictions which operate *in rem*, without reference to the litigant parties, are principally those of the Spiritual Courts, upon marriages, matters testamentary, and other questions of ecclesiastical cognizance; of courts of Admiralty, in questions of prize; of the Court of Exchequer, upon the forfeiture of goods; and orders of justices, upon questions of settlement.

In the first place, it is evidently essential to the exercise of a jurisdiction of this nature that its adjudications upon the subject-matter should be final, not only in the courts in which they are pronounced, but in all other courts where the same question arises.

General
principles.

It would not only be inconsistent that the decision *in rem* should not be final in the court in which it is pronounced, but, from the nature of the subject-matter, mischievous and inconvenient. Although the parties who are in a greater or less degree affected by the consequences of the judgment may change, the subject-matter is immutable, and therefore the decision upon it ought not to be liable to be disturbed. And it ought to be binding in other courts, in order to prevent inconsistency, and to support the jurisdiction of the court in which that sentence has been pronounced; for it would be in vain for a court of exclusive jurisdiction to decide, if its decisions upon the subject-matter were to be wholly disregarded.

Secondly, In general all parties really interested in the proceeding *in rem* may usually be heard in assertion of their rights. Where a question of marriage or bastardy arises in the courts of common law, the certificate of the bishop, when returned and entered of record, is binding, not only upon the parties to that suit, but upon all other litigating parties between whom the same point arises (t). But in cases of bastardy, the stat. 9 H. 6, c. 11, specially provides

(s) B. N. P. 244; 11 St. Tr. 262.

(t) B. N. P. 245; 11 St. Tr. 261;
2 Wils. 128.

that before any writ of certificate shall pass out of the court to the Ordinary, a remembrance, reciting the issue joined, shall be certified to the Chancellor, and that thereupon proclamation shall be made in Chancery by three months, once in every month, to the intent that all persons, pretending any interest to object against the party which pretendeth himself to be mulier, be before the Ordinary, to make their allegations and objections, as the law of the holy church requireth (*u*). Now, although the immediate object of this statute was to ensure a greater degree of publicity and notoriety to the proceeding in the particular case of bastardy, yet it is to be observed, that it did not at all affect the nature of the proceeding before the Ordinary, but assumed that all who are interested will be allowed to offer their allegations and proofs before him. Whence, perhaps, it may be inferred, that in all such cases any party interested is entitled to insist upon his objections before the Ordinary. With respect to the proceedings upon an original suit in the Exchequer, relating to the seizure and condemnation of goods, and also to suits in the Spiritual Courts and Courts of Admiralty, it must be presumed that, before they proceed to pass a final decree or sentence, such reasonable notice has been given as the justice of the case requires.

General principles.

In conformity with these principles, it has been held that the certificate of the Ordinary, when returned to the Temporal Court, is conclusive upon all parties (*x*), as regards civil rights at least (*y*), upon questions of bastardy and marriage. So the grant of a pro-

Of the Ordinary and Spiritual Court.

(*u*) The statute also provides, that in default of making such proclamation as it requires, the writ of certificate, and the certificate of the Ordinary upon it, shall be void.

(*x*) B. N. P. 245; 2 Wils. 128; 11 St. Tr. 261; Fitz. Estopp. 282. *R. v. Rhodes*, Leach, 29.

(*y*) As to the effect of such a judgment in a criminal case the law is thus stated by D^o Grey, C. J., in *The Duchess of Kingston's Case*:

"Proceedings in matters of crime, and especially of felony, fall under a different consideration from civil suits, first, because the parties are not the same, for the King, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Courts, and cannot be admitted to defend or examine witnesses, or in any manner

intervene or appeal; secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The ground of the judicial powers given to the Ecclesiastical Courts is merely of a spiritual consideration, *pro correctione morum et pro salute animæ*. They are therefore addressed to the conscience of the party. But one great object of the temporal jurisdiction is the public peace, and crimes against the public peace are wholly, and in all their parts of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The Temporal Courts alone can expound the law and judge of the crime and its proofs; in doing so they must see with

Of the Ordinary and Spiritual Court.

bate in the Spiritual Court is conclusive evidence against all as to the title to personalty, and to all rights incident to the character of an executor or administrator (a). So is a sentence in the Spiritual Court of nullity of marriage (b), when the decision in the court itself is *direct* and *final*. Accordingly, where the wife, *de facto*, of T. was libelled in the Spiritual Court by J. S. for a divorce on the ground of a pre-contract with him, upon which the Court dissolved the marriage, although T., the husband, *de facto*, was no party to the suit, it was held that he was bound by the sentence, and that the issue of the second marriage of the wife with J. S. was legitimate (c). So where C. K. had issue M. K. by C. S. his wife, *de facto*, and after a sentence of nullity of marriage, C. K. married F., and they had issue E. K., it was held, upon the death of C. K., that so long as the sentence of nullity stood unreversed, M. K., the issue of the first marriage, was a bastard (d). Although neither the sentence of a Spiritual Court, nor of any other court, can be evidence upon a subject beyond its jurisdiction (e), yet if the matter be within its jurisdiction, it is evidence to all purposes, although not within the jurisdiction. Therefore, in an action of trespass, a sentence of deprivation in the Spiritual Court, on the ground of simony, was allowed to be read, notwithstanding the objection taken that a freehold interest of the plaintiff ought not to be concluded by what was done in the Spiritual Court. For the Court said that the Spiritual Court did not oust him of his freehold, but the ouster was the consequence of the sentence (f).

their own eyes and try by their own rules, that is, by the common law; it is the trust and sworn duty of their office."

It is observable that in *The Duchess of Kingston's Case*, the judgment given in evidence was not a judgment *in rem*. It has however been seen that upon an indictment against one as accessory to a felony, the conviction of the principal, although in other respects conclusive as to his attainder, is yet but *prima facie* evidence against the accessory. The rule therefore, as laid down by C. J. De Grey, may perhaps in like manner be regarded as an exception in *favorem vitæ*, on the same footing with the case of the accessory, without further impeaching the accuracy of that part of the judgment. See further on this subject, Vol. II. tit. POLYGAMY.

(a) Roll. Ab. 638; 4 T. R. 258; 11 St. Tr. 218; 3 T. R. 130; Roll. Ab. 678. *Noel v. Wells*, 1 Lev. 235; 1 Ld. Ray. 202. Pay-

ment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of an intestate. *Allen v. Dundas*, 3 T. R. 125.

(b) *Bunting's Case*, 4 Co. 29. *Kenn's Case*, 7 Co. 41. *Hatfield v. Hatfield*, Str. 961. *Da Costa v. Villa Real*, *ibid*. *Jones v. Bow*, Carth. 225. *Harvey's Case*, 11 St. Tr. 235.

(c) *Bunting and Lepingwell's Case*, 4 Co. 29.

(d) *Kenn's Case*, 7 Co. 41. Note, It was also there resolved that no sentence of divorce could be after the death of the parties, because that would bastardize their issue.

(e) Sty. 10. *Betsworth v. Betsworth*, 12 Vin. Ab. 128.

(f) *Phillips v. Crawley*, Freem. 84, pl. 103; 12 Vin. Ab. 128. Note, the Court

Sentence in a jactitation suit, as it seems, is not admissible evidence of marriage in a temporal court, unless it be between the same parties (*g*); at all events it is not conclusive. In *Jones v. Bow* (*h*), where the plaintiff in ejectment claimed through the issue of Robert Carr and Isabella Jones, it was held that a sentence in the Arches in a jactitation suit, by which it was decreed that there was no marriage between them, was a conclusive bar to the plaintiff, and estopped him from going into any proof of marriage, unless he could show that the sentence had been repealed. This decision, however, is open to the objection, that in a jactitation suit the question of marriage arises *collaterally*, and not *directly*, and that it is not *final*. In the case of *Hilliard v. Phaley* (*i*), it was held, that proceedings in the Spiritual Court against the father for incontinency with the mother, could not be given in evidence against a child of the marriage claiming by descent from the father (*k*). And certainly such evidence could not be considered as conclusive, because the marriage was not directly in issue. In *Blackham's case* (*l*), it was expressly held, that although a matter *directly* decided by the Spiritual Court could not be controverted, yet that the rule did not extend to any *collateral* matter to be inferred from their sentence.

Sentence of Spiritual Court in a jactitation suit.

A jactitation suit is founded merely on a supposed defamation, and involves no matrimonial question, unless the defendant plead a marriage; and whether it continues a matrimonial cause throughout, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, viz. that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears, leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause. And if such sentence is no plea to a new suit in the Ecclesiastical Court, and is not conclusive there, it cannot conclude another court which receives the sentence from going into new proofs to make out that or any other marriage (*m*). The sentence in a jactitation suit is, therefore, neither a direct nor a conclusive sentence

would not allow the proofs in the Spiritual Court to be read, because it was not a court of record.

(*g*) *Infra*, 290, note (*q*), 205.

(*h*) Carth. 225, 226; 12 Vin. Ab. 128.

(*i*) 8 Mod. 180.

(*h*) The reason which is assigned is, that such proceedings could not affect the title to lands. King, Lord Chancellor, thought that the sentence in the Spiritual

Court carried on in a regular suit, and in the life-time of the parties, that they were guilty of fornication, and the payment of commutation money by the father, was strong evidence to show that there was no marriage, and he thought it hard that it should be excluded.

(*l*) 1 Salk. 290.

(*m*) 11 St. Tr. 261.

Sentence of a Spiritual Court. as to any marriage: consequently, as it is not a proceeding *in rem*, it appears on general principles to be inadmissible evidence to prove or disprove a marriage in a proceeding in any other court. In the *Duchess of Kingston's case*, where such a sentence was offered by the defendant on a charge of polygamy to disprove the first marriage, the Judges held that such a sentence, even admitting it to be evidence at all in a criminal proceeding, was not *conclusive* evidence, and that at all events its effects might be avoided by proof of fraud or *collusion* (n). In the case of *Robins v. Cruchley*, the plaintiff having brought a writ of dower, the defendants pleaded *ne unque accomplè*; the replication alleged that Sir W. Wolseley libelled the plaintiff in the Spiritual Court, as his wife, charging her with adultery with Robins (as whose widow she claimed), and praying a divorce; and that she pleaded that she was the wife of Robins, and then set forth the sentence of the court that she was the wife of Robins. The defendants demurred; and after two arguments, the court held the plea to be bad; and this judgment seems to have been founded not merely on the consideration that the bishop could not be ousted of his jurisdiction by this plea, but also on the ground that such a decree could not be pleaded in bar at all against a stranger. Willes, C. J. said (o), no determinations in the high courts touching lands shall bind strangers; much less ought a sentence in the Spiritual Court, to which Mr. Robins was no party, to bind his heirs. And Clive, J. said (p), "Robins was no party to the suit; and why the sentence should bind his heirs I cannot conceive; it is mere matter of evidence (q). So upon an indictment for forging a will, it may be now proved that the will was a forgery, notwithstanding the probate (r), although the contrary was once held (s).

Of condemnations in the Exchequer. So a judgment of condemnation in the Exchequer is conclusive upon all (t), not only as to the right of the Crown to the con-

(n) *R. v. Duchess of Kingston*, 11 St. Tr. 261. As to the construction of stat. 1 Jac. I, c. 11, see POLYGAMY.

(o) 2 Wils. 124.

(p) *Ibid.*

(q) It was intimated by Willes, C. J., and Bathurst, J., that the sentence was not conclusive, because it was not final even between the parties, who might (according to Oughton) at any time apply to have it reversed; and that the Court would not be bound by the sentence of a spiritual court, which was not binding even in that court. Note also, the Court said, that the

sentence might possibly be evidence before the bishop.

(r) *R. v. Buttery and another*, Old Bailey, May 6, 1818. *R. v. Gibson*, Lanc. Summer Ass. 1802, cor. Lord Ellenborough; 2 Pothier, by Evans, 356.

(s) *R. v. Vincent*, Str. 481.

(t) *Scott v. Shearman*, Bl. 977: 11 St. Tr. 218. See Lord Kenyon's observations in *Geyer v. Aguilar*, 7 T. R. 606. See Evans's Observations, 2 Pothier, 354. So the judgment of commissioners of taxes on an appeal, is final in an action of trespass against the officer for levying; and a

demned property, but also in justification of the officer who seized it, where the only question is, whether it was forfeited or not (*u*). In one case, indeed (*x*), it was doubted whether the same doctrine applied to a condemnation by commissioners of Excise.

Sentence of condemnation in the Exchequer.

A conviction in penalty for adulterating spirits, which does not operate *in rem*, is not evidence between other parties. Such a conviction is not evidence for the defendant in an action for the price of spirits sold, in proof of their adulteration (*y*), and is not evidence of the facts stated on another charge in respect of the same goods, founded on a different statute (*z*). In the case of *Cooke v. Sholl* (*a*), Lord Kenyon was of opinion, that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, was conclusive evidence in an action for the seizure, that the permit was regular (*b*), and precluded all question upon the construction of the permit. It is, however, observable, that the case was decided on a collateral ground (*c*).

It has been seen that a condemnation by commissioners of Excise is final (*d*).

Inquisitions of lunacy are admissible but not conclusive evidence, when the question is as to the state of the party's mind (*e*).

warrant of distress for several duties imposed by different Acts of Parliament, each giving a separate power of distress, is legal. *Patchett v. Baneroff and others*, 7 T. R. 367; B. N. P. 244. See also 5 Price, 202.

(*u*) Ibid.

(*x*) *Henshaw v. Pleasance*, 2 Bl. 1174.

(*y*) *Hart v. Macnamara*, cor. Gibbs, C. J. See also 4 Price, 154; 5 Price, 195.

(*z*) *Attorney-gen. v. King*, 5 Price, 195.

(*d*) The question reserved upon the trial being upon the construction of the permit, and not on the point whether the determination in the Exchequer was conclusive, a verdict was entered for the defendant. 5 T. R. 255.

(*b*) *Cooke v. Sholl*, 5 T. R. 255; and see 12 Vin. Ab. A. b. 22.

(*c*) *Supra*, note (*a*). A mere acquittal, it has been seen (*supra*, 282), stands on a very different footing as to its effect in

evidence from a conviction; it may have resulted from collateral causes, independent of the merits; and in such a case it may be doubted whether the general principle, that a man is not to be concluded by a proceeding to which he was no party, is superseded by the peculiar principles which give effect to judgments *in rem*.

(*d*) *Supra*, 272. And see *Terry v. Huntington*, Hardr. 480. *Fuller v. Fotch*, Carth. 346. *Lane v. Hegberg*, B. N. P. 19. *Brown v. Bullen*, 1 Doug. 407. *Radnor v. Reeve*, 2 B. & P. 391.

(*e*) In debt on bond against executors of obligor, an inquisition finding that the testator was a lunatic, without lucid intervals, at the period of the execution of the bond, is admissible, though not conclusive evidence. *Faulder v. Silk and another, executors of Jervoise*, 3 Camp. 126; 1 Collinson, 390. See also *Sergeson v. Scaly*, 2 Atk. 412. See also Vol. II. tit. WILLS.

Admiralty
decisions.

Upon the same principles (*f*), adjudications in the courts of Admiralty, whether domestic (*g*), or foreign (*h*), upon prize questions, being decisions of an exclusive jurisdiction operating *in rem*, are conclusive evidence upon the matters which they decide (*i*), when the same points arise incidentally in other courts; whether they involve questions as to the right of property, as in actions of trover (*k*); or the questions of compliance or non-compliance with warranties in actions on policies of assurance; and even although it appear that the court has acted on peculiar rules of evidence and presumptions which are not consistent with general principles (*l*).

Accordingly (*m*) it has been held that a sentence of condemnation by a French court of admiralty during a war between England and France, is conclusive evidence to show that the ship was not Swedish (*n*). So a sentence of condemnation is conclusive evidence to show that a ship was not neutral, if that appear to have been the ground of condemnation (*o*). So a condemnation of a ship at Malaga, on the ground, *inter alia*, that the ship was English, was held to be conclusive evidence that she was not neutral (*p*). And whenever the sentence states the facts upon which the condemnation was grounded, it is conclusive as to those facts (*q*); as where the ship is condemned on the ground that she was enemy's

(*f*) "From the time of Lord Hale down to the present period it has been clearly settled that a sentence of condemnation in the Court of Admiralty, where it proceeds on the ground of enemy's property, is conclusive that the property belongs, to enemies, and not only for the immediate purpose of such sentence, but is binding in all courts and against all persons. The sentence of the Court of Admiralty proceeding *in rem* must bind all parties, must bind all the world." By the Master of the Rolls, in *Kinderley v. Chase*; at the Cockpit, 1801, Park on Insurance, 400.

(*g*) 2 East 473. *Geyer v. Aguilar*, 7 T. R. 681. *Garrells v. Kensington*, 8 T. R. 230. *Beering v. Royal Exchange Assurance*, 5 East, 99; 1 Sid. 320. *Le Caux v. Eden*, 2 Doug. 600. *Kinderley v. Chase* Park. Ins. 490.

(*h*) *Hughes v. Cornelius*, 2 Show. 232; 2 Doug. 575. *Burrows v. Jemino*, 2 Str. 782; *Roach v. Garvan*, 1 Ves. 159. Eyre, C. J., Observations, 2 H. B. 410. But the sentence must be given either in the bellige-

rent courts, or in that of a co-belligerent, or ally, by a court constituted according to the law of nations. 8 T. R. 270. *Havelock v. Rockwood*, 8 T. R. 268. *Donaldson v. Thompson*, Camp. 429.

(*i*) *Barzillay v. Lewis*, Park. Ins. 469. *Baring v. Claggett*, 3 B. & P. 201. *Saloucci v. Woodmas*, 8 T. R. 444; Park. Ins. 471.

(*k*) *Ibid.* Per Chambre, J., in *Lothian v. Henderson*, 3 B. & P. 513. *Baring v. Claggett*, 3 B. & P. 214.

(*l*) *Bolton v. Gladstone*, 5 East, 155; 5 East, 99, 155; 2 Taunt. 85.

(*m*) *Burrows v. Jemino. Roach v. Garvan*, 1 Ves. 159. Eyre, C. J.'s observations, 2 H. B. 410. Contra, *Walker v. Whitter*, Doug. 1.

(*n*) B. N. P. 244 : 2 Show. 232.

(*o*) *Bernardi v. Motteux*, Doug. 554. *Calvert v. Dovill*, 7 T. R. 523.

(*p*) *Oddy v. Bovill*, 2 East, 473.

(*q*) *Christie v. Secretan*, 8 T. R. 192. *Marshal v. Parker*, 2 Camp. 79. *Everth v. Hannan*, 2 Marsh. 72. *Fisher v. Ogle*, 1 Camp. 418.

property (*r*). And where the ground of condemnation is doubtful, the Court will look into the proceedings to ascertain the grounds of the sentence (*s*), and will act upon the grounds of that decision, provided they can be distinctly ascertained (*t*). But such a judgment must decide the point distinctly: in order to effect a warranty or representation in a policy of insurance, the intention of the Court to decide the point is not to be collected by inference or argument, but by specific affirmation (*u*); and even to this extent such decisions have not without considerable reluctance been held to be conclusive (*x*). If the facts disclosed do not warrant the sentence, it will not, as to them, be conclusive (*y*).

So if the sentence has not decided the question of property, nor declared whether it be neutral, but has condemned the property as prize on a different ground, *e. g.* of a foreign ordinance against the law of nations, the sentence, although conclusive on the question of prize or no prize, would not be so on the question of neutrality (*z*). Such a sentence is not admissible, unless it be that of a court, constituted according to the law of nations, exercising its functions in the belligerent country, or in the country of a co-belligerent or ally (*a*) in the war.

(*r*) 3 Bos. & Pul. 525.

(*s*) 3 Bol. & Pul. 525. The sentence is binding, if it can be collected from the whole of the proceedings that the sentence was founded on the fact that the property was enemy's property. *Bolton v. Gladstone*, 5 East, 155. *Baring v. Royal Exchange Assurance Company*, 5 East, 99. If a ship be condemned generally as lawful prize, no special ground being stated, it is to be presumed that it proceeded on the ground that the property was that of enemies. *Saloucci v. Woodmas*, 8 T. R. 444. *Kinderley v. Chase*, Park. Ins. 490.

(*t*) *Kinderley v. Chase*, Cockpit, 1801; Park on Ins. 544; Sir Will. Scott's observations on the case of *Pollard v. Bell*, ib. Where the sentence of condemnation of a foreign prize court, for breach of blockade, was expressed with so much ambiguity as to render it impossible to ascertain the real ground on which it proceeded; held, that the Court was at liberty, upon the evidence given at the trial in an action on the policy, to determine whether such violation of the blockade did take place or not; held also, that a voyage described in the policy as to

B., but if advised of a blockade continuing, then to *M. V.*, was not illegal. *Dalgleish v. Hodgson*, 7 Bing. 495. And see *Naylor v. Taylor*, 9 B. & C. 718. *The Shepherdess*, 5 Rob. Adm. R. 262. And see *Honyer v. Lushington*, 3 Camp. 89. *Bernardi v. Motteux*, Doug. 581.

(*u*) Per Lord Ellenborough, C. J., in *Fisher v. Ogle*, Park on Ins. 554; 1 Camp. C. 418.

(*x*) See Lord Ellenborough's observations, *ibid*.

(*y*) *Calvert v. Bovill*, 7 T. R. 523. *Pollard v. Bell*, 8 T. R. 444. See also *Bird v. Appleton*, 8 T. R. 562. *Bolton v. Gladstone*, 2 Taunt. 85; 2 Camp. 154.

(*z*) *Pollard v. Bell*, 8 T. R. 444. *Baring v. Claggett*, 3 B. & P. 215. *Bird v. Appleton*, 8 T. R. 562.

(*a*) *Oddy v. Bovill*, 2 East, 473. And, therefore, a sentence pronounced by the authority of a capturing power, within the dominions of a neutral country, to which the prize has been taken, is illegal, and inadmissible to falsify the warrant of neutrality. *Havelock v. Rockwood*, 8 T. R. 268. *Donaldson v. Thompson*, 1 Camp. 429.

Admiralty
decisions.

Such a sentence is binding, not only on the parties to the foreign suit, but in all courts and on all persons (*b*). The admissibility of such evidence seems to extend to all decisions of foreign courts of competent jurisdiction which operate *in rem* (*c*).

Proof of
foreign law.

The existence of a foreign law is to be proved as a matter of fact (*d*). The written law of a foreign state must be proved by documents properly authenticated (*e*). The unwritten law, on proof that it is unwritten, may be proved by the parol testimony of witnesses possessing competent skill (*f*). Upon a question whether the law of the mother country be the law of a colony, the statement of text writers is admissible (*g*). Acts of state in a foreign country must be proved by authenticated copies of such acts (*h*); commercial regulations by copies of such regulations (*i*).

So orders of justices on questions of settlement, when confirmed at sessions, are conclusive against all (*k*), as to all the facts stated in

(*b*) See *Kinderley v. Chase*, Park on Ins. 490; where it was held to be conclusive on the fact that the property was enemy's property.

(*c*) As in case of marriage. *Roach v. Garvan*, 1 Ves. 159. See Lord Hardwicke's observations, *ibid*. So on criminal charges. *Hutchinson's Case*, 2 Str. 733; 1 Show. 6. *Roche's Case*, 1 Leach, C. C. L. 160; *supra*, see Vol. II. tit. FOREIGN LAW. MARRIAGE.

(*d*) See tit. FOREIGN LAW, Vol. II.

(*e*) *Ib*. In *Laton v. Higgin*, 3 Starkie's C. 178, a book was produced by the French vice-consul, which he said contained the French code of laws, upon which he acted at his office. He said that there was in France an office for the printing of the laws of France, called the Royal Printing-office, where the laws were published by the authority of the French government. The book itself, which contained not only a body of French laws, but a commentary upon them, purported to have been printed at that office, and to contain a copy of the constitutional charter of France; the witness also stated that the book would have been acted on in any of the French courts. Abbott, L. C. J., admitted the evidence on the authority of the case of *The King v. Picton*, Howell's St. Tr. 514. Note, that the objection in that case seems to have been waived.

(*f*) *Miller v. Heinrich*, 1 Camp. C.

155. In the case of *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 81, Sir Wm. Scott, speaking of the authorities for the law on which the validity of a Scotch marriage was to be determined, observes, "The authorities to which I shall have occasion to refer, are of three classes; first, the opinion of learned professors, given in the present or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and, thirdly, the certified adjudications of the tribunals of Scotland on these subjects. I need not say that the last class stands highest in point of authority. Where private opinions, whether in books or writings, incline on one side and judicial opinion on the other, it will be the undoubted duty of the Court which has to weigh them *stare decisis*." The practice of a court of justice in a foreign country may be proved by witnesses professionally acquainted with the practice. *Buchanan v. Rucker*, 1 Camp. 66.

(*g*) *R. v. Picton*, 30 Howell's St. Tr. 492. On the same principle (according to Lord Ellenborough) which renders histories admissible.

(*h*) *Richardson v. Anderson*, 1 Camp. 65 n.

(*i*) 30 Howell's St. Tr. 491.

(*k*) *R. v. Northfeatherston*, 1 Sess. C. 154; 4 Burn. 602. So an order of filiation

the order (*l*), and as to all derivative settlements (*m*). So an order of removal executed without appeal, is also conclusive (*n*) as to the settlement of the pauper up to that time, against all the world; but where the justices wanted jurisdiction, the order is a nullity (*o*); and may be objected against, even after a lapse of twenty years.

Proof of
foreign law.

The proceeding by *quo warranto* is analogous to a proceeding *in rem*, so that a judgment of ouster against a mayor upon a *quo warranto* is evidence upon a similar proceeding against a burgess who claims to have been admitted by that mayor (*p*); and is conclusive evidence, unless fraud can be shown (*q*). So also a conviction of felony is, for many purposes, a proceeding *in rem*; and is in general binding against all as to the consequences of the attainder. It is still, however, as has been seen, competent to an accessory to controvert the guilt of the alleged principal, although the record of conviction is *prima facie* evidence against the accessory as to the guilt of the principal. In Buller's *Nisi Prius*, a conviction for bigamy seems to be considered to be in the nature of a proceeding *in rem*; and therefore, as conclusive in an action of ejectment upon a question of legitimacy: this, however, seems to be very doubtful in principle (*r*).

Judgment
in quo
warranto.

Where the judgment is admissible evidence against one who was neither a party nor privy to it, being a direct, final and conclusive determination of a court of competent jurisdiction upon the particular subject-matter, the rule seems to be, that the judgment is conclusive in any other, unless it can be impeached on the ground of fraud or collusion (*s*). Fraud, however, does not merely lower

Conclusive,
unless fraud
shown.

is conclusive to show that the party is the putative father. *R. v. Best and others*, 6 Mod. 185. See also *R. v. Catterall*, 6 M. & S. 83. *R. v. Surratt*, Burr. C. C. 73. *Barrow v. Islip*, Salk. 524. *R. v. Knaptoft*, 2 B. & C. 885. *R. v. Wick St. Lawrence*, 5 B. & Ad. 526. *R. v. Whelock*, 5 B. & C. 511. *Osgathorpe v. Dinworth*, 2 Str. 1256. *R. v. Oldbury*, 4 Ad. & Ell. 167. The fact whether the order was quashed on the merits or not may be inquired into on subsequent removal. *R. v. Wick St. Lawrence*, K. B. Mich. 1833. *R. v. Osgathorpe Whelock*, 5 B. & C. The former quashing was by consent, the pauper not being removable. See Vol. II. tit. SETTLEMENT, where the decisions on this subject are more fully considered.

(*l*) Ibid. And *R. v. Woodchester*, 2 Str. 1172; B. S. C. 191; 2 Bott. 685.

(*m*) *R. v. St. Mary, Lambeth*, 6 T. R.

616. *R. v. Silchester*, B. S. C. 551; 2 Bott. 686.

(*n*) 2 T. R. 598; 11 East, 388. *R. v. Corsham*; and see 2 Salk. 488. *Sutton St. Nicholas v. Leverington*, B. S. C. 276.

(*o*) 8 T. R. 178. *Semble*, the quashing of an order upon an appeal, concludes nothing as to the place of settlement; for it may have been quashed because the party was not removable.

(*p*) B. N. P. 231. *R. v. Lisle*, Andr. 163. 336. 389. *R. v. Hebden*, 2 Str. 1109; 2 Barnard, 70; 5 T. R. 72.

(*q*) *R. v. The Mayor of York*, 5 T. R. 72.

(*r*) B. N. P. 245; *supra*, 265, *et seq.*

(*s*) B. N. P. 244; 11 St. Tr. 262. Fraud (according to Lord Coke) avoids all judicial acts, ecclesiastical or temporal.

Conclusive,
unless fraud
be shown.

the evidence to mere *primâ facie* evidence of the fact, capable of being rebutted by adverse evidence, but destroys its effect altogether. For it seems that a record of a judgment *in rem* is usually either *conclusive*, or wholly *inoperative*; except, indeed, in cases of felony, where the guilt of the accused depends partly upon the guilt of another, as the guilt of an accessory depends upon that of the principal; for there the record of the conviction of the principal is but *primâ facie* evidence to affect the accessory, who may controvert the guilt of the principal, notwithstanding the record (*t*). A judgment upon a *quo warranto* against a mayor, is evidence upon a *quo warranto* against one claiming to be a burgess by virtue of his admission; it is not indeed absolutely conclusive (*u*), but it cannot be impeached except upon the ground of fraud (*x*). So in the *Duchess of Kingston's case*, upon the trial of the defendant, on an indictment for bigamy, one of the points resolved by all the Judges was, that admitting a sentence of the Spiritual Court in a jactitation suit to be conclusive evidence for a defendant, yet, that still the counsel for the Crown might avoid the effect of it, by proving it to have been obtained by fraud and collusion (*y*).

Conclusive
against par-
ties—when.

Although it is a general rule that a stranger may be admitted to impeach a proceeding to which he was not a party, on the ground of fraud or collusion, the reason ceases where the judgment or sentence is offered against one who was a party to it. In the case of *Prudham v. Phillips*, the defendant proved her marriage with *A. B.*; this was answered by a sentence in the Ecclesiastical Court (to which she was a party), which showed that she was then married to another person; and after much consideration, Willes, C. J. refused to permit the defendant to show that the sentence had been fraudulently obtained (*z*). Judgments of courts of competent jurisdiction in foreign countries, upon the subject of marriage, and all other matters where the adjudication can be considered as *in rem*, seem to be equally binding with the decisions of our own courts (*a*).

To prove
custom, &c.

Fourthly (*b*), in cases of custom, prescription and pedigree, or where general reputation is evidence, a judgment, decree or sentence is evidence, not only as between the same parties (where it

(*t*) *Fost.* 365, 6, 7; 9 *Co.* 118, 119;
supra, *England v. Bourk*, 3 *Esp. C.* 80.

(*u*) *R. v. Grimes*, *Burr.* 2598. *B. N. P.*
231; 2 *Barnard*, 370. *R. v. Lisle*, *Andr.*
163; 5 *T. R.* 72. *R. v. Hebdon*, *Str.* 2109;
11 *State Tr.* 1261.

(*x*) 5 *T. R.* 72; and see the cases last
cited.

(*y*) 11 *St. Tr.* 261. *Cross v. Salter*, 3
T. R. 639.

(*z*) *Ambler*, 763.

(*a*) See Lord Hardwicke's *dictum*, *Roach*
v. Garvan, 1 *Ves.* 159; *supra*, 294.

(*b*) *Supra*, 254.

would be conclusive upon the same point); but also against all others; for such evidence is of the same nature, but much stronger, than mere evidence of reputation (c). Accordingly, to prove a custom, not only an ancient verdict in prohibition has been held to be evidence (d), but also a recent verdict (e). To prove custom, &c.

So is a decree in the Exchequer, on a commission to try the question of custom (f).

So in the case of a prescription for a public right of way, a verdict against one defendant, negating such a right, is evidence against another defendant who justifies under the same right (g). So upon a question as to the liability to repair a public highway (h), or upon the public right of election to a parochial office (i).

So a special verdict between other parties is evidence to prove a pedigree (k).

Such evidence is not conclusive (l), unless both the parties be the same.

When such evidence is adduced to prove a custom or prescription, where general reputation would be evidence, a judgment or verdict would be evidence against strangers to the record, as falling within the general description of evidence capable of supporting such an issue, being in fact a solemn adjudication, founded upon satisfactory testimony, and therefore certainly as binding upon a stranger as much as mere hearsay upon the subject; but it is not, it seems, *conclusive*, where the party was in fact a stranger to the record, because he had not an opportunity to cross-examine the witnesses, or to disprove the fact by opposite testimony, and ought not to be concluded by the *laches* of another.

The *proofs* of verdicts, decrees and judgments, whether of record or not of record, have already been considered in common with the proofs of public documents in general (m). At present, such Proof of judgments, verdicts, &c.

(c) 1 East, 157. The record of a judgment in an action of trespass by a corporation for putting up stalls in a market, the defendant having pleaded a right to do so without paying toll, is admissible evidence for the corporation, being relevant to the claim in issue. *Lawrence v. Lovell*, 6 C. & P. 437; 9 Bing. 465.

(d) Bac. Ab. 617.

(e) B. N. P. 283; Carth. 281.

(f) *Cort v. Birkbeck*, Doug. 218.

(g) *Read v. Jackson*, 1 East, 355.

(h) *Ibid.* and *R. v. St. Pancras*, Peake's C. 219.

(i) *Berry v. Banner*, Peake's C. 156.

(k) 1 Burr. 146. B. N. P. 233. Carth. 79. 181. 5 Mod. 386. Sir T. Jones, 221. 2 Mod. 142, *contra*. *Neale v. Wilding*, 2 Str. 1151. Mr. J. Wright was of opinion in that case that the verdict was admissible; the other Judges differed from him, because it was *res inter alios acta*, and the evidence laid before the former jury might, for anything they knew to the contrary, still be produced.

(l) See the cases referred to, and also *Biddulph v. Ather*, 2 Wils. 23. *Mayor of Hull v. Horner*, Cowp. 111.

(m) See PUBLIC DOCUMENTS, PROOF OF, 223.

Proof of
judgments,
verdicts,
&c.

matters only will be noticed as are peculiar to this branch of the subject. They are either of record or not of record. If of record, they are to be proved either by actual production from the proper repository, by an exemplification (*n*), or by a sworn copy (*o*). Records are complete as soon as they are delivered into court ingrossed upon parchment, and become permanent rolls of the court; then, and not before, a copy becomes evidence (*p*). A judgment of the House of Lords may be proved by means of a copy of the minute-book of the House of Lords, for the minutes of the judgment are the solemn judgment itself (*q*). An averment that a commission has been duly superseded, ought to be proved by a writ of supersedeas under the great seal (*r*). An objection to the reading a decree or judgment must be made before it is read (*s*).

A verdict is not evidence without producing the judgment, or an examined copy, for perhaps the judgment was arrested, or a new trial granted (*t*); but the rule does not hold where the trial was upon an issue out of Chancery, for there the decree is evidence that the verdict was satisfactory (*u*). But the production of the *postea* without the judgment is evidence to show the fact that there was a trial between the parties (*x*), and the amount of the damages; or

(*n*) See above, 224; Bac. Ab. Ev. F. Str. 102.

(*o*) For these proofs, see tit. PUBLIC DOCUMENTS, &c.

(*p*) Gil. L. Ev. 22; *supra*, 224; B. N. P. 283. An allegation in an indictment for conspiracy, &c. that at the quarter sessions, &c. a bill of indictment was preferred against A. B. and found by the grand jury, can only be proved by a caption formally drawn up of record at such sessions, and by the production of the original or an examined copy; held therefore that the minutes of the clerk of the peace were inadmissible, although no record had in fact been drawn up. *R. v. Smith*, 8 B. & C. 341. To prove the time of signing final judgment, the day book at the judgment-office, from which the judgments are entered into the docket-books is not evidence. *Lee v. Meacock*, 5 Esp. C. 177. Minutes of proceedings at sessions, from which the record is afterwards to be drawn up, are not evidence on a subsequent prosecution for perjury, alleged to have been committed by a witness on a former trial. *R. v. Bellamy*, 1 Ry. & M. C. 171. But in the case of *The King v. Tooke*, it was held that the indictment, with the officer's

notes, was evidence of an acquittal of one charged as a conspirator, without having the record formally drawn up. See Vol. II. tit. CONSPIRACY. Proof of a writ of execution is not evidence of a judgment, except as against a party to the cause. *Ackworth v. Kemp*, Doug. 40, and see Vol. II. tit. SHERIFF.

(*q*) Per Lord Mansfield. *Jones v. Randall*, Cowp. 17; Bac. Ab. Ev. 619.

(*r*) *Poynton v. Forster*, 3 Camp. 60. The Chancellor's order for the *supersedeas* is insufficient.

(*s*) *Layburn v. Crisp*, 8 C. & P. 397.

(*t*) *Pitton v. Walker*, 1 Stra. 161; Willes, 367; B. N. P. 234; Hard. 118. But formerly a verdict was admitted, although the judgment was arrested. Gil. L. E. 37, 2d edit.

(*u*) *Montgomery v. Clarke*, Bac. Ab. Ev. F.; B. N. P. 234. *Hopkins v. Jones*, 1 Barnard, 243.

(*x*) Str. 102; Barnard, 243. *R. v. Mimms*, Esp. N. P. 750. See *Harrop v. Bradshaw*, 9 Price, 359; Willes, 367. In *Farmer v. Hitchingman*, Willes, 367, it was held that the *postea* and indorsement on it were admissible to prove allegations, that a cause (which was proved *aliunde* to

as introductory of the evidence of a witness since dead (*y*); or on a trial for perjury (*z*). Proof of judgments, verdicts, &c.

An allegation that an indictment was preferred, and a true bill found, is not, it has been held, proved by the production of the bill itself indorsed as a true bill, but should be proved by the record made up (*a*).

The judgment of a Court is proved by a copy examined with the judgment entered on the roll; proof by the judgment book of the court is not sufficient, although the record may not have been made up, and although the party interested in the judgment is a stranger (*b*).

have existed) was brought to trial on an issue joined, when a juror was withdrawn, and the cause referred. See *Barnes*, 449; 7 Mod. 451. But the *postea* is not, it seems, evidence to establish the fact proved by the verdict. *Pitton v. Walker*, 1 Str. 162. In *Garland v. Schoones*, 2 Esp. C. 647, Lord Kenyon is reported to have held that the mere production of the *postea* was sufficient to establish a set-off for the defendant, to the extent of the sum indorsed as the verdict in the cause; and added, that in the case of issues out of Chancery, the Chancellor always admitted the production of the *postea* as conclusive evidence of the extent of the demand. But there it is not usual to enter up judgment in such a case, and the decree of the Court is proof that the judgment stands in force. *Montgomery v. Clarke*, B. N. P. 234. *Hopkins v. Jones*, 1 Barnard, 243. In the case of *Baskerville v. Brown*, 2 Burr. 1229, which was cited by the party offering the *postea* in *Garland v. Schoones*, the objection was, that the defendant having recovered a verdict for 30 *l.* against the plaintiff at the same sittings, could not set off against the plaintiff's claim in the latter action for 11 *l.*, part of the sum for which he had obtained a verdict, without deducting the 11 *l.* There the *postea* was offered, not by the defendant in the latter action to establish his set-off, but by the plaintiff in the latter action, to show that the plaintiff in the former action had taken a verdict for his whole debt. In *Foster v. Compton*, 2 Starkie's C. 365, it was doubted whether in such a case the plaintiff was entitled to recover half the costs on production of the *postea*, with the

Master's allocatur, without producing the judgment. The *postea* is admissible as introductory to prove what a witness, since dead, swore upon the former trial. *Pitton v. Walker*, 1 Str. 162; B. N. P. 243. *R. v. Iles*, and *R. v. Robinson*, there cited.—To prove the day on which the Court sat for the trial at Nisi Prius, the record itself must be produced. *Thomas v. Ansley and Smith, Sheriffs of London*, 6 Esp. C. 80. Where, however, there are proper materials, the *postea* may be indorsed in court, *nunc pro tunc*. *R. v. Hammond Page*, 2 Esp. C. 650, and 6 Esp. C. 83. But where a juror has been withdrawn, and the cause referred, such special circumstances will not be allowed to be indorsed in court at the second trial. *Ibid.* It was also held that the *postea* could not be read without a stamp. *Ibid.* In London and Westminster it is not the practice, as in country causes, for the officer at the trial to indorse the *postea*; and the *postea*, with a minute of the verdict indorsed by the officer on the jury pannel, is evidence to show that the cause came on for trial. *R. v. Browne*, 1 Mood. & M. 315. The minute being a general one against all the defendants, it was held that parol evidence was admissible to show that one of them was acquitted.

(*y*) 1 Str. 162; B. N. P. 243; Hardr. 118.

(*z*) See Vol. II. tit. PERJURY.

(*a*) *Porter v. Cooper*, 6 C. & P. 354. So in order to prove that an appeal was heard at the sessions, a record must be made up. *R. v. Ward*, 6 C. & P. 306.

(*b*) *Ayres v. Davenport*, 2 N. R. 474 *supra*, 224.

Proof of judgments, verdicts, &c.

An office copy of a rule of court is admissible in the same court and in the same cause, but not in a different cause, though in the same court (*c*). An office copy of a will received in the course of office, need not be proved to be an examined copy (*d*).

A Judge's order is sufficiently proved by the rule of court thereon (*e*).

Proof of a decree in Chancery.

Proceedings in Chancery by bill and answer are not records, because they are not precedents of justice, being decided according to the justice and equity of each particular case (*f*); and therefore they may themselves be given in evidence (*g*).

But regularly, in order to prove the facts on which a decree professes to be founded, the proceedings on which it is founded ought to be read in evidence (*h*). A decretal order in paper may be read on proof of the bill and answer (*i*), or without such proof, if they be recited in the order (*k*).

The decree itself is proved either by means of an exemplification, an examined copy, or decretal order in paper (*l*).

Sentences of Spiritual Courts.

A sentence of the Spiritual Court of a divorce *à mensû et thoro* has been received as evidence, without proving the libel and other proceedings (*m*). The probate of a will consists of a copy of the

(*c*) *Denn v. Fulford*, Burr. 1177.

(*d*) *Duncan v. Scott*, 1 Camp. C. 100.

(*e*) *Still v. Halford*, 4 Camp. C. 17.

(*f*) Co. Litt. 280.

(*g*) Bac. Ab. Ev. 620.

(*h*) Com. Dig. tit. Ev. A. 4. Upon a question as to the right of the deputy oyster meters of unloading, &c. all oysters brought within the port of London, and to have reasonable compensation; held, that a decree in equity upon the same right was admissible in evidence, without putting in the depositions, although referred to in the decree, but that when the decree had been put in, either party was entitled to read the depositions. *Layburn v. Crisp*, 8 C. & P. 397.

(*i*) See 1 Keb. 21. Com. Dig. Ev. C.

(*k*) Com. Dig. Ev. C. 1, by Trevor, J., in *Wheeler v. Louth*, there cited; but see 1 Keb. 21. It has been said, that if a party wish to avail himself of the decree only, and not of the answer, he may give the decree in evidence under the seal of the court, and enrolled, without producing the answer; and the opposite party will be at liberty to show that the point in

issue was not the same as the present issue. B. N. P. 235; citing *Lord Thanet v. Paterson*, K. B. Easter, 12 G. 1. But as a general rule, the whole record ought to be produced. Com. Dig. Ev. A. 4. So in proof of a sentence in the Admiralty Court on a libel and answer, or the judgment of a court baron, the proceedings ought to be produced. Com. Dig. tit. *Evidence*, C. 1. Where the mere object is to prove the fact that a decree was made, or made and reversed, and not to prove the contents, proof of the previous proceedings is not necessary. *Jones v. Randall*, Cowp. 17. And see the observations of Bayley, B., in *Blower v. Hollis*, 1 Cr. & M. 396. And in the case of an ancient decree, where the bill and answer have been lost, the decree alone is admissible.

(*l*) Com. Dig. Ev. (c. 1.); and see *Blower v. Hollis*, 1 Cr. & M. 396. *Trowell v. Castle*, 1 Keb. 21.

(*m*) *Stedman v. Gooch*, 1 Esp. C. 4. Lord Kenyon, C. J., and afterwards in K. B.

will ingrossed upon parchment, under the seal of the Ordinary, with a certificate of its having been duly proved (*n*). A probate is therefore good evidence of the will, as to the personal estate, being a copy of it under the seal of the court, which preserves the original will in its own custody (*o*).

When administration is granted by the Ecclesiastical Court, it does not grant an exemplification, but only a certificate that administration was granted (*p*). And therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence (*q*). So would the book of the Ecclesiastical Court, wherein was entered the order for granting administration (*r*). So the original book of acts, directing letters of administration to be granted with the Surrogate's fiat, is evidence of the title of the party to whom administration is directed to be granted, without producing the letters of administration themselves, notwithstanding subsequent letters of administration granted to another, the first not being recalled (*s*). So an examined copy of the act-book, stating that administration was granted to the defendant, is proof that he was administrator, in an action against him, as such, without notice to produce the letters of administration (*t*). So the act of the court indorsed upon the will is as good evidence with respect to the title to personalty as the probate itself (*u*). But although the probate of the will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court (*x*), without some indorsement upon it for the purpose of authentication. In an action against an executor for money had and received, after notice had been proved to pro-

(*n*) 3 Bac. Ab. tit. *Executor*, B. N. P. 244.

(*o*) B. N. P. 246.

(*p*) B. N. P. 246. *Knapton v. Cross*, 8 G. 2, K. B.; Bac. Ab. Ev. F.; 1 Lev. 25.

(*q*) B. N. P. 446.

(*r*) Ibid. and *Elden v. Keddell*, 8 East, 187. Bac. Ab. Ev. F. 631. *Polhill v. Polhill*, 1701.

(*s*) *Elden v. Keddell*, 8 East, 189.

(*t*) *Davis v. Williams*, 19 East, 232. *Kay v. Clarke*, ib. 238.

(*u*) *Doe v. Barnard*, Cowp. 295. Where by the practice of the Ecclesiastical Court no book was kept, but a memorandum only indorsed or entered at the foot of the original will by the officer of the court, it was held, that the production of the will

with such memorandum was sufficient evidence of the executor's title; and also, that an exemplification of several letters of administration relating to the same estate on one parchment, with one 3 l. stamp, was sufficient. *Doe v. Gunning*, 2 Nev. & P. 260.

(*x*) *R. v. Barnes*, Starkie's C. 243. Per Raymond, C. J., in *Coe v. Westernham*, Norfolk Summer Assizes, 1725. Sel. N. P. 793: "I cannot allow the original will to prove property in the executor; the probate must be produced, or perhaps the Ecclesiastical Court will not allow this to be the testator's will. Besides, until probate, a man dies intestate; and if his executor die before probate, his executor shall not be executor to the first testator."

Sentences
of Spiritual
Courts.

duce the probate, it was held, that the original will produced by the officer of the Ecclesiastical Court, and bearing the seal of that court, and indorsed as the instrument on which the probate was granted, with the value of the effects sworn to, was admissible as secondary evidence (*y*). Where a probate has been lost, an examined copy is evidence to prove the party to be the executor, for the probate is an original document of a public nature (*z*). In such case it is the practice of the Ecclesiastical Court to grant, not a second probate, but an exemplification only (*a*).

The minute book of the Ecclesiastical Court is evidence of a decree for discovery pronounced in that Court, although no decree be drawn up; nothing in practice being done with the minutes unless the alimony be not paid (*b*).

Although it be a general rule that the probate or ledger-book be no evidence, except in relation to the personal estate, yet the ledger may in some instances be secondary evidence as to a devise of a real estate; as where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land; but producing the Ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged (*c*). Since the ledger-book is a roll of court, it seems that a copy is admissible evidence (*d*). Although a probate be no evidence to prove the contents in a will, in order to establish a pedigree, since it is but a copy, and the seal of the court does not prove it to be a true copy, unless the suit relate only to the personal estate; yet the ledger-book, it seems, in such cases is admissible evidence, as being a roll of court, and made under the authority of the Spiritual Court, to prove such a relation (*e*).

To prove that the probate has been revoked, an entry of the

(*y*) *Gorton v. Dyson*, 1 B. 219; and *qu.* whether it would not be good original evidence. The probate-act book, containing an entry that the will was proved and probate granted, was held to be the original, and primary evidence; and, therefore, to be sufficient proof that the parties were executors, although the probate was not produced, nor any excuse offered for its non-production. *Cox v. Allingham*, 1 Jac. 515. And see *Garrell v. Lister*, 1 Lev. 25.

(*c*) *Hoe v. Nelthorpe*, 1 Salk. 154. *R. v. Haynes*, Skinn. 584. In *R. v. Haynes*, Comb. 339, Holt, C. J., said, that a copy of

a probate was not evidence, because it was a copy of a copy.

(*a*) *Shepherd v. Shorthouse*, 1 Str. 412.

(*b*) *Howleston v. Smyth*, 2 C. & P. 25. The practice of the court is proveable by oral evidence. *Beaurain v. Scott*, 3 Camp. 388.

(*c*) Ca. K. B. 375; B. N. P. 246.

(*d*) B. N. P. 246, where it is said that the contrary had been often ruled, on the mistaken ground that the ledger was a copy.

(*e*) *R. v. Ramsbottom*, 1 Leach, C. C. L., 30, in note.

revocation in the book of the Prerogative Court, which is the record of the proceedings of the court, is good evidence (*f*).

A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. Copies of court-rolls, and of proceedings in the Ecclesiastical and inferior civil courts, are also evidence, since the originals are public documents (*g*). And it is said, that as it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes are good evidence (*h*). It appears also, that in the case of an inferior court, such as a court-baron, hundred, or county-court, evidence should be given of the proceedings previous to the judgment, as well as of the judgment itself (*i*), in order to show that the proceedings were regular (*h*). In an action for a malicious arrest, on process out of the Sheriff's Court in London, it was held that, in order to prove the averment that the former suit was wholly ended, &c., it was sufficient to show an entry in the minute-book of "withdrawn by the plaintiff's order," opposite to the entry of the plaint, and to prove that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff (*l*).

Judgment
of an inferior
court.

It is said that when actions are brought against justices of the peace, they must show the regularity of their convictions, and that the informations upon which their convictions were founded must be produced and proved in court (*m*). But it seems that the conviction itself, when proved under the hand and seal (if necessary) of the magistrate, is sufficient evidence that the judgment which it recites was given (*n*). In the case of *Massey v. Johnson* (*o*), it

Proof of
convictions
by justices
of the
peace.

(*f*) B. N. P. 246.

(*g*) 12 Vin. Ab. A. b. 26, pl. 49.

(*h*) Per Hale, in *R. v. Hains*, 12 Vin. Ab. A. b. 26, pl. 49; Comb. 337. *Fisher v. Lane*, 2 Bl. 834, per Lord Tenterden. *R. v. Smith*, 8 B. & C. 342. But see *Pitcher v. Rinter*, 12 Vin. Ab. A. b. 48, *contra*. If they are not entered in the books they may be proved by the officer of the court, or other person cognizant of the fact. *Dyson v. Wood*, 3 B. & C. 451.

(*i*) Com. Dig. tit. *Evidence*, C. 3. *Fisher v. Lane*, 2 Bl. 836. *Arundel v. White*, 14 East, 216.

(*k*) Vide *supra*, 209. In an action on a judgment of an inferior court, the defendant may (it has been held) plead that

the cause of action did not arise within the jurisdiction of the court. *Herbert v. Cooke*, Willes, 36, in note; or may take advantage of it on evidence at the trial. See 2 Mod. 272. See Appendix, 303.

(*l*) *Arundel v. White*, 14 East, 216. See *Macally's case*, 9 Co. 69, where the brief note of the plaint was as follows: "ss. *J. M. & R. R.* Debt 500*l.* pledges *C. D.* by *R. F.* serjeant," and was held to be sufficient to warrant the arrest.

(*m*) Str. 710; but see Vol. II. tit. JUSTICES.

(*n*) Per Holt, C. J., *Fuller v. Fotch*, Holt, 287; Carth. 346; Hardr. 478. Vol. II.

(*o*) 12 East, 67.

Proof of
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was held that a magistrate might justify, by virtue of a conviction of the plaintiff as a vagrant, although the warrant of commitment alleged that the plaintiff had been charged on the oath of *T. S.*, and in fact no charge had been made by *T. S.*, but the defendant had been convicted upon the information of another person, and although the conviction itself was informal. But it was observed, that the case would have assumed a very different shape if there had been no information to ground the conviction (*p*). In the case of *Gray v. Cookson and others* (*q*), it was held that the defendants, having jurisdiction over the subject-matter, were protected by a conviction drawn up after the commencement of the action.

An Act of Parliament, in making certified copies evidence of the proceedings of a court, does not take away the right of proof by the production of the original proceedings (*r*).

Proof of an
award.

Where the parties have submitted themselves to the jurisdiction of an arbitrator appointed by themselves, his decision, as has been observed, will be conclusive upon the subject-matter to the extent of his authority (*s*). In order to establish his award or judgment, it will be necessary to prove his authority by proof of the submission bonds, or other written or parol authority, and to prove the due making of the award (*t*).

Of a
foreign
judgment.

A foreign judgment should be authenticated by an exemplification or copy under the seal of the court. In such case it is not sufficient to prove the hand-writing of the Judge, without also proving that the seal affixed to it is the seal of the court (*u*). If a colonial court be proven to have no seal, other proof, as by the signature of the Judge, must be given to entitle it to credit (*v*). It is not sufficient to produce what purports to be a copy under the seal of one who is proved to be clerk of the court (*x*). A divorce under

(*p*) *Per Le Blanc*, C. J. *ib.*

(*q*) 16 East, 13.

(*r*) So held in reference to the Insolvent Act, 7 Geo. 4, c. 57. *Northam v. La-touche*, 4 C. & P. 140.

(*s*) *Supra*, 272. And see *Doe v. Rosser*, 3 East, 11.

(*t*) See Vol. II. tit. AWARD.

(*u*) *Henry v. Adey*, 3 East, 221. *Black v. Lord Braybrooke*, 2 Starkie's C. 7. *Appleton v. Lord Braybrooke*, 2 Starkie's C. 6; 9 Mod. 86. *Alves v. Bunbury*, 4 Camp. 28. *Buchanan v. Rucker*, 1 Camp. 63. *Flindt v. Atkins*, 3 Camp. 215. If a colonial court possess a seal, it ought to be used, although so much worn as no longer to make any impression.

Cavan v. Stewart, 1 Starkie's C. 525.

(*v*) *Appleton v. Lord Braybrooke*, 2 Starkie's C. 11. *Alves v. Bunbury*, 4 Camp. 28.

(*x*) *Ibid.* But it seems that an examined copy of a foreign judgment would be admissible; 6 M. & S. 36. *Adamthwaite v. Synge*, 1 Starkie's C. 183. In *Alison v. Furnival*, 1 Cr. M. & R. 277, it was held that an agreement of reference made in France was proved by an examined copy, and the evidence of the attesting witness, the original being deposited with a notary in Paris for safe custody, and proof being given of the established usage in France not to allow the removal of a document so circumstanced.

the seal of a foreign court is not evidence without calling persons to prove the law of the country (y).

A judgment, decree, or sentence, may be impeached by proof, first, that it never existed, or was void *ab initio* (z); secondly, that it was fraudulent and covinous; thirdly, that it has been revoked.—First, that it never existed, as by showing that the alleged probate was forged (a); that the testator had *bona notabilia* in another diocese (b); that the testator is still living; but not that the will was forged (c), or that the testator was *non compos*, or that another is executor (d), for this would be to falsify the judgment (e). In trespass, where the plaintiff had been convicted upon four convictions, for carrying on his trade, upon the same day, it was held to be a sufficient answer to three of such convictions, that the justices had no jurisdiction, although the convictions had not been quashed (f). An Ecclesiastical Judge is not liable to an action, though he excommunicate a party erroneously, but it is otherwise if he excommunicate not having jurisdiction (g). So it may be shown that a person is not within the scope of the bankrupt laws, although the commissioners have declared him to be a bankrupt (h). But nothing which might have been insisted upon by way of appeal against a sentence can be urged in answer to the evidence supplied by the sentence (i); and therefore, where

How rebutted.

(y) *Ganer v. Lady Lanesborough*, Peake's C. 17. See *Fremoult v. Dedire*, 1 P. Wms. 431.

(z) No appeal need be made against an order where the justices wanted jurisdiction; see Vol. II. tit. SETTLEMENT; or against the proceedings of commissioners, in respect to matters as to which they had no authority. *Attorney-general v. Lord Hotham*, 1 Taunt. 219.

(a) T. Raym. 404-G; 2 Sid. 359.

(b) B. N. P. 247; 1 Sid. 359. *Noel v. Wells*, 1 Lev. 195, per Buller, J.; 3 T. R. 131; 5 Rep. 30.

(c) But upon an indictment for forging a will, it may be proved that the will was a forgery, notwithstanding the probate. *R. v. Buttery and Mucnamara*, 1 Burn, by Chetwynd, 771. In the case of an inferior court not of record, the party may show that the cause of action did not arise within the jurisdiction. *Herbert v. Cooke*, Willes, 36, note (a).

(d) *Stirling's Case*, 11 St. Tr. 223.

(e) 1 Lev. 235; 2 Keb. 237.

(f) *Durden v. Cripps*, Cowp. 640. So as to an order of removal. Vid. *infra*.

(g) *Ackerley v. Parkinson*, 3 M. & S. 411. See also *Moody v. Thurston*, 1 Str. 481; Vol. II. tit. JUSTICES. *Brown v. Bullen*, 1 Doug. 407. *Lord Radnor v. Reeve*, 2 B. & P. 391.

(h) In strictness, the reason why the adjudication of the commissioners in such cases is not obligatory, is, that it is merely an *ex parte* proceeding, and partakes no more of the nature of a judgment than the finding a bill of indictment by a grand jury.

(i) *R. v. Grundon*, Cowp. 315. The case was put on the same footing with a decree in the Admiralty Court, which must stand till reversed. Note, the Court doubted whether Mr. Crawford, the prosecutor, was a member of Queen's College; but held, that even if he were, the sentence was not examinable but by appeal to the visitor, and that the King's Courts could not interfere. As to the general principle

How rebutted.

upon an indictment for assaulting a gentleman commoner, and expelling him from the gardens of a college, the defendant relied upon a sentence of expulsion, it was held to be no answer, that a sufficient number of members had not concurred in the sentence. So it may be shown that Commissioners having especial power by an inclosure act to make an award have not pursued that power (*h*). Secondly, That it was fraudulent or covinous, for strangers ought not to be bound by such a proceeding. Accordingly, in the *Duchess of Kingston's Case*, it was resolved that, even admitting the sentence in the Spiritual Court to be conclusive, still the effect might be removed by showing collusion (*l*). And in a much later case, it was held, that a sentence of divorce from the first marriage, obtained in Scotland by fraud on the part of the husband, would be no bar to a prosecution for bigamy (*m*). In an action for assault and wounding the plaintiff, it may be shown that an acquittal upon an indictment charging the injury as a felonious wounding, was fraudulent and collusive (*n*). So where an executor pleads judgments recovered, the plaintiff may reply that they are covinous (*o*). So a stranger to a fine or recovery may avoid it by showing collusion (*p*). So if it appear on the face of the proceedings that the party to be affected by a foreign judgment, or by process of foreign attachment, was never summoned, or never had notice of the proceeding (*q*). But it is a general rule, that a person who was a party to

that a sentence by the members of a college, or by the visitor on appeal, is conclusive, see *Phillips v. Bury*, Skinn. 447; 2 T. R. 346. *Dr. Patrick's Case*, 1 Lev. 65. *Dr. Widrington's Case*, 1 Lev. 23. *Case of New Coll.*, 2 Lev. 14.

(*h*) *Rez v. Washbrooke*, 4 B. & C. 732. For the further consideration of the subject of jurisdiction, especially as regards the operation of a judgment or sentence to protect those who had jurisdiction to pronounce it, see Vol. II. tit. JUSTICES.

(*l*) 11 St. Tr. 250. 262; 1 Ves. 159; And. 392.

(*m*) *Martin Lolly's Case*, Russ. & Ry. C. C. L. 237.

(*n*) *Crosby v. Leng*, 12 East, 409.

(*o*) *Lloyd v. Maddox*, Moore, 917.

(*p*) 11 Str. 262.

(*q*) *Buchanan v. Rucker*, 19 East, 192.

Cavan v. Stewart, 1 Starkie's C. 525. It is against natural justice to convict a man without a summons. *R. v. Cotton*, 1 Sess. C. 179; 1 Bott, 486; 1 Burn's J. 254, 23d ed. *Doe v. Gartham*, 1 Bing. 357. *R. v. Gaskin*, 8 T. R. 209. *Williams v. Lord Bagot*, 3 B. & C. 772, in error. The husband need not be summoned in case of a criminal proceeding against the wife. *R. v. Ellen Taylor*, 3 Burr. 1681. In *R. v. Clegg*, Str. 475, an order of bastardy made at sessions set out no summons, but the Court said they would presume one. In order to sustain a suit in England for damages awarded by an admiralty court abroad, the transcript of the proceedings in the admiralty court should show expressly, and not by mere inference, the sentence of the admiralty court, and that the defendant was within its jurisdiction. *Obicini v. Bligh*, 8 Bing. 335.

the proceeding (*r*), or who might have been a party (*s*) to it, cannot show collusion in order to repel the judgment. Thirdly, That the judgment has been reversed, as that letters of administration have been revoked (*t*), or the probate repealed (*u*). But an appeal against a sentence is no answer to the sentence (*r*); and an attainder standing unreversed, although founded upon an insufficient indictment, is valid and pleadable in bar (*y*). Other evidence to impeach the truth of a record is inadmissible; it is not competent to a party to prove that a verdict was improperly entered by mistake (*z*).

How rebutted.

Secondly, inquests of office, depositions and evidence, taken in the course of a judicial proceeding. Such inquests as are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analogous to adjudications *in rem*, being made on behalf of the public; no one is properly a stranger to them; and all who can be affected by them usually have the power of contesting them. In general, where property is vested in the Crown upon an inquest of office, by a coroner, escheator (*a*) or other officer of the Crown the parties affected by the inquest have a right of traverse reserved to them, or they may proceed by *monstrans de droit*. Upon a finding of *felo de se*, the executor or administrator may remove it into the Court of King's Bench, and traverse it (*b*); for it would be hard that he should be concluded by an inquisition, which is nothing more than an inquest of office, taken behind his back (*c*). By the express provisions of many statutes, inquests of office before escheators are required to be held in a public open place, and every one is to be heard in evidence (*d*). And by the provisions of these statutes the remedy by traverse and *monstrans de droit* has been much

Inquisitions.

(*r*) *Prudham v. Phillips*, Str. 2; Ambler, 703.

(*s*) *Mayo v. Browne*, 11 St. Tr. 213.

(*t*) 2 Sid. 359.

(*u*) 3 Lev. 135; but note, such repeal would not invalidate a payment to the executor. *Allen v. Dundas*, 3 T. R. 125.

(*x*) *Hervey's Case*, 11 St. Tr. 207. 212. Ann. 11.

(*y*) 4 Co. 45; 2 Hale, 251. *Price v. Oldfield*, And. 222; 2 Sid. 359. An execution on an erroneous judgment is good till reversed, 1 Lord Ray. 546. An accessory cannot take advantage of error in the judgment against the principal, 1 Hale, 925. *R. v. Baldwin*, 3 Camp. 265; and see *Holmes v. Walsh*, 7 T. R. 465. Judg-

ment against the husband for treason, not reversed, sufficient to deprive the wife of her dower; per Lawrence, J. *ib.*

(*z*) *Reed v. Jackson*, 1 East, 355.

(*a*) See as to the writ of escheat, the st. 1 H. 8, c. 8. The inquisition on such a writ is evidence to show, according to the finding of the jury, that the party died without heirs.

(*b*) 1 Hale, P. C. 416, 17. *Barclay's Case*, Easter, 45 Ed. 3; but *Ld. Coke* held otherwise, 3 Inst. 55.

(*c*) According to Lord Hale, 1 P. C. 416, 417. East's P. C. 389.

(*d*) 34 Ed. 3, c. 13; 36 Ed. 3, c. 13; 1 H. 8, c. 8; 2 & 3 Ed. 6, c. 8; 3 Comm. 260.

Inquisi-
tions.

enlarged (e). Upon the same principle, upon the execution of a writ of extent, one who claims property in the goods which are in possession of the defendant may assert his claim before the sheriff, and cross-examine the witnesses adduced by the prosecutor (f). But still it seems that the finding of a *fugam fecit* by the coroner's inquisition against one who occasioned the death of another, is conclusive (g), although a jury upon the trial find otherwise (h); yet, upon principle, a traverse ought to be admitted in that case as well as upon the finding a party *felo de se* (i).

Since then the usual effect of such inquest of office is to vest the property in the Crown, reserving to the party affected, in most instances, a right of traverse, the consequence seems to be, that such inquisition, standing undisputed and unreserved, would be conclusive as to the right of property, not only as between any claimant and the Crown, but also, as in the case of *Toomes v. Etherington* (k), between any other parties.

The plaintiff in that case sued as administrator of Toomes, upon a judgment recovered by the intestate against the defendant; the defendant pleaded that the intestate was *felo de se*, whereby the judgment was forfeited; the plaintiff replied a subsequent statute of pardon, to which the defendant demurred, and the judgment was given for the defendant; because by the finding of the inquest the debt and damages were vested in the king, and the statute contained no words of restitution.

Upon an issue *devisavit vel non*, the question was, whether the inquest of the coroner, *super visum corporis*, finding the testator lunatic, was admissible: and the Court was divided upon the point (l); two of the Judges deeming it to be inadmissible, because the parties were not the same, the one being a civil and the other a criminal proceeding. But in that case the dissentient Judges expressed their opinion that an *inquisitio post mortem* would be admissible, because it was a civil proceeding, and because of the antiquity of it, to prove a pedigree (m); and the Chief Justice cited *Lord Derby's Case*, where an *inquisitio post mortem* had been admitted (n).

(e) 3 Comm. 360.

(f) *R. v. Bickley*, 3 Price, 454; and the sheriff having refused to permit such interrogatories to be put, the Court set aside the inquisition.

(g) 1 Will. Saund. 362, n. 1.

(h) Ibid.

(i) See 1 Saund. 362, n. 1.

(k) 1 Saund. 361.

(l) The inquest was read at the instance of Pratt, J., although he was of opinion that it was not, in strictness, admissible; because it was an issue out of Chancery, and merely to inform the conscience of the Chancellor. Str. 68.

(m) *Jones v. White*, Str. 68.

(n) And see B. N. P. 228; and per Hardw. C. in *Sir Hugh Smithson's Case*, 1b.

In *Sergeason v. Sealy* (o), Lord Hardwicke said that inquisitions of lunacy, inquisitions *post mortem*, and others, were always admissible, though not conclusive. In the case of *Burridge v. The Earl of Essex* (p), an inquisition *post mortem*, setting out the tenor of a deed, was held to be evidence of the deed.

Inquisitions.

An inquisition of lunacy may be considered to be in the nature of a proceeding *in rem*, since it is instituted by the direction of the Lord Chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted (q), to inquire into the state of the party's mind. In the case of *Faulder v. Silk* (r), Lord Ellenborough, upon a plea of *non est factum* to a declaration on a bond, admitted proof of an inquisition taken on a commission of lunacy, against the obligor (to whom the defendant was executor), upon which he had been found to be a lunatic; but held that it was by no means conclusive. So such an inquisition has been received as evidence in a criminal case, to show the insanity of the prisoner (s).

Inquisition of Lunacy.

In the case of *The Queen v. Sutton and others* (t), upon an indictment against the defendant for the non-repair of Kelm bridge, (under an alleged obligation *ratione tenuræ*,) the defendants gave in evidence a presentment against the vill of Kelm, in the reign of Edward the Third, upon which the defendants had been acquitted, the jury upon that presentment finding, in answer to questions put by the Court, that the bridge had been built within 60 years of report of the men of the county passing that way; and as to the question, who of right ought to repair the bridge, having answered that they were ignorant: and it was held that the presentment and finding, which had been removed into Chancery, together with a grant of pontage for the repairs of the bridge, soon afterwards granted by the Crown, were admissible in evidence on the part of the defendants to negative the alleged immemorial liability to repair the bridge.

From the judgment in this case, the Court appear to have been of opinion that the inquest was admissible as a public proceeding, in which the jury might properly inquire, not only whether the persons charged, but also in general who, and whether any one, were liable to the repairs (u).

(o) 2 Atkins, 412. *Faulder v. Silk*, 1 Collinson, 306; 2 Madd. Ch. 576.

(p) 2 Lord Raym. 1292. An *inquisitio post mortem*, and traverse thereon, is evidence, although it be voidable. *Leighton v. Leighton*, Str. 308; ib. 1151.

(q) 3 P. Wms. 108.

(r) 3 Camp. 126.

(s) *R. v. Bowler*, O. B. June 1812; cor. Le Blanc and Gibbs, Js. See Vol. II. tit. WILL.

(t) Ad. & Ell. 576.

(u) *Bayley v. Wyllie*, 6 Esp. C. 85. *Vicar of Killington v. Trin. Coll.*, 1 Wils. 170. In *Roe v. Brenton*, 8 B. & C. 747, an inquisition taken under the stat. 4 Ed. 1,

Inquisitions.

Where an inquisition has been taken without legal authority it is inadmissible; as in *Latkow v. Eamer* (x), where it was held, that an inquisition by the sheriff to ascertain to whom the goods seized under an execution against A. belonged, was not evidence for A. in an action brought by A. against the sheriff.

Depositions, when admissible.

Depositions (y) of witnesses (z), although made under the sanction of an oath, are not in general evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called upon, and had the opportunity to do so; for otherwise one of the great and ordinary tests of truth would be wanting (a). Since evidence of this kind is of a weak and secondary nature, it is not admissible, unless it be, first, the best evidence, and also unless the party against whom it is offered, or the party under whom he claims, has had the power of cross-examination, and has been legally called on so to do; which must be proved by showing, secondly, that he was a party to the proceeding; thirdly, that it was a judicial proceeding; fourthly, that he cross-examined, or might have done so. There are some exceptions where the proceeding is of a public nature, or the evidence falls within the general scope of the rule as to reputation.

Witness must be dead or absent.

It is an incontrovertible rule, that when the witness himself may be produced, his deposition cannot be read, for it is not the best evidence (b). But the deposition of a witness may be read not only where it appears that the witness is actually dead, but in all cases where he is dead for all purposes of evidence; as where diligent search has been made for the witness and he cannot be found (c),

was received, although the commission could not be found. And see *Hardcastle v. Sclater*, 2 Gwill. 787. *Anderton v. Magawly*, 2 Bro. P. C.

(x) 2 H. B. 437. *Glossop v. Poole*, 3 M. & S. 175.

(y) As to depositions taken before Justices, see Vol. II. tit. DEPOSITIONS.

(z) The oral testimony of a witness on a former trial stands upon the same grounds. B. N. P. 242. *Sherwin v. Clarges*, 12 Wil. 3; 1 Ld. Raym. 730. A deposition by an interested witness is not admissible any more than his testimony would be. Depositions of parishioners tending to charge the defendant with costs, on an information for money received by him for the use of the parish, are admissible in evidence where the witnesses are not relators men-

tioned by name in the information. *Att.-Gen. v. Griffiths*, 1 Kenyon, 126.

(a) *Supra*, 24.

(b) Str. 920; Godb. 193. 320; Salk. 278. 281. 286; 4 Mod. 146; Hob. 112; Hardr. 232; 5 Mod. 9. 163. 277; T. Raym. 170. 335, 336. *Fry v. Wood*, 1 Atk. 45. *Coker v. Farewell*, 2 P. W. 563; B. N. P. 239.

(c) Godb. 326; L. Ev. 106; 2 Str. 920. *Benson v. Olive*, 2 Str. 920. If the party cannot find a witness, then he is as it were dead to him; and his deposition may be read, so as the party make oath he did his endeavour to find him, but that he could not see him, nor hear of him. Godb. 326; 12 Vin. Ab. A. b. 36. To entitle a party to read a deposition taken upon interrogatories, it is not sufficient to show

where he resides in a place beyond the jurisdiction of the court (*d*), or where he has become lunatic or attainted.

Witness
must be
dead or
absent.

It has even been said, that if a witness, having been subpoenaed, falls sick by the way, his deposition may be read (*e*). So if the witness had been kept out of the way by the adversary (*f*), or labour under any infirmity which incapacitates him as a witness (*g*). So the deposition of a party absent in Ireland has been admitted (*h*). According to the practice of the Court of Chancery in directing an issue at law, an order is made that the depositions of witnesses shall be read on the trial, on satisfactory proof that they are unable to attend in person (*i*). The principal object of the order is convenience in dispensing with the ordinary preparatory proof (*k*). Where depositions have been taken in *perpetuam rei memoriam*, and a witness afterwards becomes a party to the suit, his deposition cannot be read, for the intent of the deposition was to perpetuate testimony in case of the death of the witness (*l*). And so it was

that the witness was a seafaring man, and that he lately belonged to a vessel in the Thames, without proving for what port the vessel was bound, or that any inquiry had been made for the witness.

(*d*) *Lord Altham v. Earl of Anglesey*, Gil. Eq. Cas. 16. 18; Rep. temp. Holt, 736.

(*e*) Mod. 283, 284; Ld. Raym. 729; P. Will. 288, 289; 12 Mod. 215. 231; Bac. Ab. Ev. 625; Vin. Ab. A. b. 31, pl. 10; 1 Ves. & Beames, 22. *Jones v. Jones*, 1 Cox's Cas. 184. In *R. v. Hogg*, C. C. & P. 176, the deposition of an old and bedridden woman was allowed to be read, there being no probability that she would be able to attend at a future assizes. But Patteson, J., in *R. v. Savage*, 5 C. & P. 143, held that although the illness of a prosecutor might be a good ground for putting off the trial, it was not so for the purpose of receiving his depositions. A deposition in Chancery cannot, without a special order, be read, on the ground that the witness cannot attend by reason of sickness. And see *Harrison v. Blades*, 3 Camp. C. 445, and Vol. II. tit. DEPOSITION. It seems, on the whole, to be clear that the courts will not, at all events, admit the deposition of a witness in evidence whilst any reasonable hope remains that the witness may be able to attend on some future opportunity.

(*f*) *Green v. Gatewicke*, B. N. P. 243.

(*g*) B. N. P. 239; Ld. Raym. 1166. *Fry v. Wood*, 1 Atk. 145. So it has been said, if the witness be unable to travel. But see the case of *Harrison v. Blades*, 3 Camp. 445. And see Vol. II. tit. DEPOSITIONS.

(*h*) 11 Mod. 210; 2 East, 251. *Hodnett v. Forman*, 1 Starkie, 90; Gil. Eq. R. 16. 18; but see Tr. p. Pais, 7th ed. 385, 386, where a distinction is taken between Ireland, and a place out of the king's dominions.

(*i*) *Corbet v. Corbet*, 1 Ves. & Beames, 340.

(*k*) *Palmer v. Lord Aylesbury*, 15 Ves. 176.

(*l*) *Tilley's Case*, Lord Raym. 1009; 1 Salk. 286. Depositions having been taken in *perpetuam rei memoriam*, the inheritance afterwards descended to the person who was sworn as a witness; and the Judges of the C. P. and of the Court of K. B. held, that the depositions could not be read; and Holt, C. J., said, that such depositions could not be read in any case until the death of the witness, much less in a case where the witness was himself a party; see *Holcroft v. Smith*, Eq. Cas. Ab. 224; Trin. 1702; Vin. Ab. Ev. A. b. 31, pl. 42. *Baker v. Lord Fairfax*, Str. 101; B. N. P. 242. Where a plaintiff in equity appointed a witness his executor, who revived the suit, his deposition was ordered

Witness
must be
dead or
absent.

held, where a deponent became interested after his examination in a court of equity, but was no party to the suit (*m*); and yet if the witness become interested by operation of law, the case seems, with respect to the question of evidence, to be just the same as if he had become blind or lunatic; and in equity depositions have been admitted under such circumstances (*n*). Where a witness has been examined on interrogatories by consent, on account of his expected absence, yet if he be not absent at the time of the trial his deposition cannot be read (*o*); but it is not necessary that he should be actually on his voyage when the trial comes on; if he be on board and ready to sail, or if the ship has been compelled to put back (*p*) upon a temporary exigency, the deposition is still evidence. Reasonable proof must be adduced by the party who offers the deposition in evidence, to show the necessity of resorting to it (*q*). The statement in the deposition itself is insufficient (*r*). Upon an application by the defendant, a trial for a misdemeanor has been postponed, upon his consenting, by writing under his own hand, to the examination of a witness for the Crown upon interrogatories (*s*).

Identity of
parties.

Secondly, a deposition is not admissible unless the parties be the same; for a stranger to the former suit had no opportunity to cross-examine, and therefore cannot be affected by the depositions (*t*); and he cannot use them against one who was a party, because he could not have been prejudiced by them, and therefore, for want of mutuality, ought not to take advantage of them (*u*).

to be read on such trial. *Andrews v. Beauchamp*, 7 Sim. 65.

(*m*) *Baker v. Lord Fairfax*, Str. 101.

(*n*) 2 Ves. 42. *Glyn v. Bank of England*, *Holcroft v. Smith*, Eq. Cas. Ab. 224. *Goss v. Tracy*, 2 Vernon, 699; 1 P. Wms. 287; 2 Vernon, 472. *Haws v. Hand*, 2 Atk. 615. In *Glyn v. Bank of England*, 2 Ves. 42, Lord Hardwicke said such evidence was allowable on good reason, for the evidence was to be taken as it stood at the time of the witness's examination, which should not be set aside unless it could be supplied by other evidence.

(*o*) *Proctor v. Lainson*, 7 C. & P. 629; 2 Salk. 691; 2 Tidd's Pr. 854. For it is an implied condition that the attendance of the witness is not practicable.

(*p*) *Fonsick v. Agar*, 6 Esp. 92. *Ward v. Wells*, 1 Taunt. 462.

(*q*) *Proctor v. Lainson*, 7 C. & P. 629. It has been held to be insufficient to show that the witness was a seafaring man, and

that several months ago he belonged to a vessel lying in the River Thames, without showing the nature of the vessel, or whither she was bound. *Falconer v. Hanson*, 1 Camp. 171.

(*r*) *Proctor v. Lainson*, 7 C. & P. 629.

(*s*) *Highfield v. Peake*, M. & M. 110. *R. v. Morphey*, 2 M. & S. 602. The same thing was done upon the trial of Mr. Hastings; see 2 M. & S. 603.

(*t*) B. N. P. 242. *Cooke v. Fountain*, 1 Vern. 413; 2 Rol. Ab. 679; Hob. 155.

(*u*) Bac. Ab. Ev. 626. *Rushworth v. Countess of Pembroke*, Hardr. 472; Gil. Ev. 55; but see Vin. Ab. Ev. A. b. 31; pl. 47. This principle seems to have been extended to a case where the party against whom the depositions were offered in evidence had himself read the depositions in a former cause. *Atkins v. Humphreys*, 1 Mood. & R. 523. On an issue from Chancery between A. & B., it was held, that depositions produced by B. in Chancery, in

Accordingly on an appeal of murder an appellant could not give in evidence an indictment for the same murder, and what a witness had sworn upon the trial (*x*); and as the evidence on the indictment was not evidence for the appellant, neither was it for the appellee (*y*). *A.* preferred his bill against *B.*, and *B.* exhibited his bill touching the matter against *A.* and *C.*; on a trial at law it was held, that *C.* could not use the depositions in the same cause between *A.* and *B.*, but that the whole must be tried as *res nova* (*z*). The depositions or evidence of a witness in one cause cannot be evidence in another, where the verdict would be inadmissible; for the oath cannot be given in evidence without first giving the verdict in evidence (*a*); for otherwise it would not appear that the oath was more than a voluntary affidavit. But it is not necessary that the depositions should have been made, or the evidence given in the same proceeding, providing the parties be the same; in the Court of Chancery, depositions in one cause are frequently read in another; and in courts of law the evidence which the witness gave on a former trial may be read after his death in a subsequent one (*b*).

Identity of parties.

But although the parties are the same, yet if the same matters were not in issue in the former cause, the depositions, it is said, are not evidence (*c*); this rule, however, at all events, does not apply to cases where depositions are offered against those who were not

Identity of subject-matter.

a suit of *C.* against *B.*, were inadmissible. *Qu.* And see the observations on this subject. *Phill.* on Ev. 571, 8th ed.

(*x*) 1 Sid. 235; 2 Haw. 430; 2 Roll's Rep. 460; 2 Keb. 384; Bac. Ab. Ev. 620. The reason assigned is, that an indictment is not evidence on an appeal, and that appeal is a new cause, and therefore it is necessary to have the parties face to face.

(*y*) B. N. P. 243; 1 Sid. 325.

(*z*) Law of Evid. 108; Hard. 472; 12 Vin. Ab. 160, pl. 24.

(*a*) B. N. P. 242; 1 Sid. 325; but see 253, n. (*i*). It seems to be sufficient to give the *postea* in evidence.

(*b*) Per Lord Kenyon, 4 T. R. 290. *Pyke v. Crouch*, Lord Raym. 730. *Pitton v. Walter*, Str. 102. *Green v. Gatewicke*, B. N. P. 243; 12 Mod. 319; Barnard, 213. 243. *Lord Palmerston's Case*, cited by Lord Kenyon, 4 T. R. 290, where upon a trial at bar it was held, on all hands, that what Lord Palmerston swore upon a former trial was evidence, the witness having died in the interim; but the evidence was

ultimately rejected, because the witness could not give the words, but only the fact. In Chancery, depositions taken thirty years ago have been admitted to be read, although the parties were not the same; because they related to the same land, and the tenants were parties to it, and the plaintiff's title did not then appear. B. N. P. 240; Chan. Cas. 73; Bac. Ab. Ev. 627; Eq. Ca. Ab. 627. If *A.*, claiming two estates, *M.* and *N.*, convey *N.* to *B.*, and bring ejectment against *C.*, who has recovered *M.* from him in ejectment, the evidence of witnesses examined for *A.* is not admissible for *B.* in an ejectment brought by *B.* against *C.*, who has recovered the estate *N.* from him. *Doe d. Foster v. Lord Derby*, 1 Ad. & Ell. 783. Formerly depositions in *perpetuam rei memoriam* were not published till after the death of the witnesses, which was attended with inconvenience, because they swore with impunity. Bac. Ab. Ev. 627.

(*c*) *Allibone v. the Attorney-general*, Vin. Ab. Ev. A. b. 31, pl. 45.

Identity of subject-matter. parties to the former suit, as matter of reputation, for there the very circumstance that the same matter was litigated, has been urged as an objection to the evidence (*d*).

Neither does the objection apply in criminal cases ; a deposition made upon a particular charge may frequently be read upon the trial of the prisoner for another. A deposition taken upon a charge of assault and robbery may be read upon a trial for murder, the transaction being the same (*e*).

Privy of Claim.

Depositions in a former cause cannot in general be read against one who does not claim under the party with whom such depositions were taken ; but in equity, if a legatee bring a bill against the executor, and prove assets, it is said that another legatee, although no party, may have the benefit of those depositions (*f*) ; at law they may be read where the defendant claims in privy with the defendant in the former suit (*g*).

In a legal proceeding.

Thirdly, in order to admit a deposition, or the oral testimony of a witness in a former cause, it is necessary to show that such a cause or proceeding legally existed, for otherwise it would not appear that the deposition was anything more than a mere voluntary affidavit of a stranger (*h*). It seems to be a general rule, that the depositions or evidence in a former cause are never admissible in evidence unless the verdict or judgment would in itself be evidence (*i*).

It is also a rule, that no extra-judicial deposition can be used in evidence ; for the party was not bound to take any notice of

(*d*) *Infra*, 319.

(*e*) *R. v. Smith*, 2 Starkie's C. 208. And see *Radburn's Case*, 1 Leach, 457 ; and Vol. II. tit. DEPOSITIONS.

(*f*) *Coke v. Fountain*, Vern. 415 ; 12 Vin. Ab. 160, pl. 27. A party executed a power of appointing funds in settlement in favour of children, after the death of one, the mother and the survivors executed a voluntary conveyance in favour of children of the deceased, and subsequently conveyed the premises to a purchaser, who filed a bill to set aside the voluntary conveyance, and a bill was also filed to establish the sale, by a partner of the purchaser, alleging the consideration to have been paid in part with his money, and a suit was afterwards filed against the two latter parties to establish the conveyance, and set aside the sale as fraudulent and collusive, in which suit an issue was directed as to the *bona fides* of the sale,

and payment of the consideration ; held, that on the trial the depositions taken in the first suit by the purchaser were properly rejected. *Humphreys v. Pensam*, 1 Myl. & Cr. 580.

(*g*) *Earl of Bath v. Battersea*, 5 Mod. 9 ; 12 Vin. Ab. 111, pl. 31.

(*h*) B. N. P. 242. *Sherwin v. Clarges*, 12 Will. 3 ; Lord Raym. 730.

(*i*) B. N. P. 242. Because the giving the verdict, &c. in evidence is a preparatory step ; but it seems that the production of the *postea* would be sufficient to warrant the reception of such evidence, since it would show the fact that a trial was had between the same parties. It should seem, however, that where a new trial is granted, and one of the witnesses dies in the meantime, his evidence on the former trial would be admissible, although the verdict itself would be inadmissible. 4 T. R. 290.

Extra-judicial not admissible.

the proceeding. Accordingly, upon an indictment for a libel, depositions before a magistrate were not admitted in evidence; as they would have been under the statutes of Ph. & Mary, in cases of felony (*j*). Nor are they so in any case where the proceeding is *coram non judice* (*k*); as, where a voluntary affidavit is made before the Master (*l*), such an affidavit would not be evidence, unless the admission of the party who made it would be evidence (*m*). So if the bill has been dismissed on account of the irregularity of the complaint (*n*), as if the depositions are taken in a revived suit, where a bill of revivor does not lie (*o*), for in such a case there is no complaint before the court in which depositions can regularly be taken. But if the bill be dismissed merely because the matter is not proper for a decree in equity, although within the jurisdiction of the court, the depositions may be read in another cause between the same parties (*p*). Where the proceeding is merely voidable, it seems that the depositions may be read; but it is otherwise where it is absolutely void (*q*). But in some instances where depositions have been irregularly taken, a Court of Equity will order that they shall stand (*r*). Depositions before justices cannot be read on an indictment for treason, or for a misdemeanor, or upon the trial of an appeal, or in a civil action (*s*), for they are extra-judicial. It was held, that depositions in the Court of Wards were not evidence in the King's Bench to prove the same title (*t*).

It has frequently been held, that depositions taken in a Spiritual Court cannot be used, even by consent (*u*), in a Court of Common Law (*x*), because it is not a court of record. Yet the same objection applies to depositions in Chancery. In *Breedon v. Gill* (*y*), Lord Holt expressed an opinion that depositions before commissioners of excise might, if the witnesses died, be afterwards read before the commissioners of appeals. And depositions under the statutes of Philip & Mary, and 7 Geo. 4, c. 64, are read upon trials for felony, although they are not of record (*z*). And it is to be

(*j*) *R. v. Paine*, 5 Mod.; 12 Vin. Ab. Ev. A. b. 31.

(*k*) *Stock v. Deneu*, Vin. Ab. Ev. A. b. 31, pl. 16.

(*l*) Sty. 446; *May v. May*, K. B. at Bar; Bac. Ab. Ev. 628.

(*m*) Ibid.

(*n*) 1 Ch. Ca. 175; *Backhouse v. Middleton*, Gil. Ev. 50.

(*o*) 1 Ch. C. 175.

(*p*) *Smith v. Vuale*, Lord Raym. 735; Ch. C. 175; 3 Ch. Rep. 72; 12 Vin. Ab. 100, pl. 15. *Noyder v. Peacock*, ib. 112, pl. 41.

(*q*) Str. 308.

(*r*) *Murray v. Wise*, cited Str. 308.

(*s*) 2 Hale's P. C. 286; Lord Raym. 730.

(*t*) 2 Roll. R. 212.

(*u*) March, 120.

(*x*) Litt. R. 167; B. N. P. 242; 2 Roll. Ab. 679; Bac. Ab. Ev. 628; 2 Hale, 285; March, 120; 1 Haw. c. 42; Vin. Ab. Ev. A. b. 31. The power of taking depositions has since been enlarged. See Vol. II. tit. DEPOSITIONS.

(*y*) Lord Raym. 222.

(*z*) See 2 Hale, 284.

Extra-judicial not admissible.

observed, that these statutes do not expressly direct that these depositions shall be evidence; they were, indeed, originally intended for a different purpose, and they become evidence as authorized proceedings in the course of the same prosecution. In *Welsh's Case* (a), Lord Hale assigns two reasons why, upon an indictment for a forcible marriage with Mrs. Puckring, the deposition of Mrs. Puckring before commissioners appointed to dissolve the marriage, if they thought fit, should not be read: First, because it was a proceeding according to the civil law, in a civil cause; secondly, because she was interested; and does not hint that it was an objection that the court was not a court of record. With respect to depositions in the Ecclesiastical Court, C. B. Gilbert lays it down that they may be read when taken in a cause over which they have jurisdiction, as far as relates to that cause, since they are lawful oaths, and a man may be indicted for violation of them (b). When, indeed, they are taken in a cause over which they have no authority, as where the realty is concerned, they clearly are not admissible (c). Where depositions have been taken in an ancient suit to perpetuate testimony, it cannot be objected that the answers were given to leading interrogatories, since the party to the proceeding might have objected to them, and have had them expunged, instead of which he allowed publication to pass, and the evidence to be exemplified (d).

Neither, where interrogatories and cross-interrogatories have been exhibited by the parties, can the answers of the deponent be objected to on the ground that the witness was interested (e).

Power to cross-examine.

Fourthly, a deposition is not evidence against one who had not the power or liberty to cross-examine the witness, and does not claim under one who had that power (f). Accordingly, depositions

(a) 2 Hale, 285.

(b) Gil. Ev. 60.

(c) Gil. Ev. 60; 2 Roll. Ab. 679; Litt. R. 167; March, 120.

(d) *Williams v. Williams*, 4 M. & S. 407. See Examination in Equity, p. iv. There was a presumption, in the above case, that publication passed in the lifetime of the witnesses. See the observations of Bayley, J., 4 M. & S. 503.

(e) *Ogle v. Palcski*, Holt's C. 485.

(f) Hardr. 472. 215; 2 Jones, 164; Wils. 214, 215; Hob. 155; 2 Roll. Ab. 679; 1 Vern. 413. Where barrack commissioners, acting under 47 Geo. 3, c. 1, in taking public accounts, examined witnesses, and put their depositions in

writing; and an information having been filed against the defendant relative to certain contracts, the matters were referred to arbitration; held, that the arbitrators could not receive such depositions, having been taken without the defendant having had an opportunity of being present, or of cross-examining the witnesses. *Attorney-general v. Davison*, 1 M. & Y. 160. The examination of a witness taken before commissioners on an inquiry, cannot be read as evidence on a petition to expunge the proof of a creditor who was not a party to that inquiry. *Ex parte Coles*, Buck, 242; Cooke, B. L. 552, 8th ed. *Ex parte Campbell*, 2 Moore, 51.

taken before commissioners of bankrupt, being *ex parte*, were not evidence previous to the statutes (*g*) by which they are made evidence in particular cases (*h*). In Chancery, the witness was examined *de bene esse*; an answer was put in; but the witness was so ill, that he could not be cross-examined, and before the end of three weeks he died, and all the Judges held that the deposition was not evidence (*i*). So if before the coming in of the answer, the defendant not being in contempt, the witness die (*h*). Where, however, the defendant is in contempt for refusing to answer, the objection ceases, for it was his own fault that he did not cross-examine the witnesses (*l*). And in general, where the party has had an opportunity to cross-examine in the course of a regular legal proceeding, and has neglected to do so, the case is the same in effect as if he had cross-examined (*m*).

Power to
cross-
examine.

(*g*) 5 G. 2, c. 30, s. 41, which directs that the proceedings under a commission may, upon petition, be entered of record, and that true copies, signed and attested as therein directed, shall be evidence in case of the death of the witnesses. And the stat. 49 G. 3, c. 121, s. 10. And now see the stat. 6 G. 4, c. 86, ss. 90 & 92, which make depositions in bankruptcy, in certain cases, conclusive; also the stat. 2 & 3 Will. 4, c. 44, s. 7, which makes such depositions evidence in certain cases, the deponents being dead. See also the stat. 59 G. 3, c. 12, as to the examinations of prisoners touching their settlements; and see tit. BANKRUPTCY—EXAMINATION—SETTLEMENT.

(*h*) 1 Lev. 180; Lord Raym. 220; T. Jones, 53. *Janson v. Wilson*, Doug. 224. *Bowles v. Langworthy*, 1 T. R. 306; 2 Roll. Ab. 679; B. N. P. 242. The depositions of deceased witnesses taken before commissioners of bankrupt, on the opening of the commission, and cancelled by the assignees afterwards appointed, are not evidence against the assignees in an action by the bankrupt. The assignees in such a case have no opportunity of cross-examining the witnesses at a meeting which is strictly private. *Chambers v. Bernasconi*, 1 C. M. & R. 352.

(*i*) *Brown's Case*, Hardr. 315. *Dutton v. Colt*, Sir T. Raym. 335. But see Ch. R. 90; Vin. Ab. Ev. A. b. 31, pl. 8. A deposition is not admissible before answer put in, or party is in contempt, unless he had the opportunity of cross-examining. *Caze-*

nove v. Vaughan, 1 M. & S. 4. So if the witness be examined without service of the order so to do. *Mulvany v. Dillon*, 1 Ball & B. 413.

(*k*) Hardr. 215; 2 Jon. 164; 2 Wils. 503; for there the defendant had not an opportunity of cross-examining. In such case, the party, it is said, may apply to the Court of Chancery that the deposition may be read, and if the Court see cause, they will order it; and this order, it is said, will bind the parties to assent, but will not bind the Court of Nisi Prius. Gil. Ev. 57; B. N. P. 240; 2 Jon. 164.

(*l*) Gil. Ev. 56. And see *Cazenove v. Vaughan*, 1 M. & S. 4. The observations of Le Blanc, J., ib.; B. N. P. 240; Com. Dig. Ev. C. 4.

(*m*) *Cazenove v. Vaughan*, 1 M. & S. 4. The plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, and the defendant did not put in any answer. The plaintiffs gave notice to the defendants of an order obtained from the Court for the examination, and of the questions intended to be put, and examined the witness the same evening, who set off the next day, and never returned. The plaintiffs obtained a further order for publication of the deposition, in order that it might be read at the trial, and the deposition was admitted in evidence. See Gil. Ev. 62, 64, 4th ed.; 4 Mod. 146. *Howard v. Tremaine*, Hardr. 315, semb. *contra*, 1 P. Wms. 414. *Copeland v. Stanton*, B. N. P. 240; Com. Dig. Ev. C. 4.

Power to
cross-
examine.

Evidence given by a witness on the trial of an issue directed by the Court of Chancery is evidence in an action upon the trial of an ejectment after the death of the witness against the lessor of the plaintiff, who was the plaintiff in equity (*n*). For the lessor had the power of objecting to the competency of the witness, the same right of cross-examination, and of calling witnesses to discredit or contradict the testimony of the witness.

Depositions taken *de bene esse*, before the answer of the defendant, are not admissible in a Court of Law, since they are taken before issue joined (*o*). But a Court of Equity will sometimes direct them to be read (*p*); such an order, however, is not binding in a Court of Law (*q*). Where, upon a bill to perpetuate testimony, the defendant was in contempt, and would not answer, and the plaintiff had a commission, and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and before the coming in of the answer the witnesses died, it was held, after much debate, that the depositions were admissible between the parties on a trial at law, for otherwise a bill to perpetuate testimony would be of no use (*r*). There the defendant joined in commission, and cross-examined, but the principle seems to extend to all cases where the defendant refuses to answer (*s*), for otherwise he might wait till all the witnesses were dead, having in the meantime prevented his antagonist from perpetuating their testimony (*t*). Where the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is the same in effect as if he had cross-examined (*u*).

(*n*) *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 3. Note, that in the suit in equity others than the defendant in the ejectment were co-defendants. In the above case it was said that the lessor of the plaintiff had the same opportunity, on both occasions, of calling witnesses for the purpose of contradiction. Other parties being opponents in the former suit, this may not perhaps be strictly true; but it seems to be sufficient to warrant the reception of such evidence, that the party against whom it is offered had the opportunity to cross-examine and to contradict the testimony by adverse proof.

(*o*) 2 Jones, 164; Vin. Ab. A. b. 31, pl. 12. 22. *Dutton's Case*, Sir T. Raym. 335; Hardr. 315; 2 P. W. 162. *Hall v. Hodgeson*, 12 Vin. Ab. 108.

(*p*) 2 Jones, 164.

(*q*) *Ibid. supra*, 317 (*k*).

(*r*) Show. 363, 264; Carth. 265; 4 Mod. 147; Salk. 278; 12 Vin. Ab. 110.

(*s*) But great stress was laid upon that fact by Grey, J., Carth. 265.

(*t*) See *Brown's Case*, Hardr. 315; Vin. Ab. Ev. A. b. 31, pl. 23. *Dutton's Case*, T. Raym. 335; Law of Evid. 114; Vin. Ab. Ev. A. b. 31, pl. 12; and the observations in *Cazenove v. Vaughan*, 1 M. & S. 4.

(*u*) *Cazenove v. Vaughan*, 1 M. & S. 4. The defendant not having put in any answer to the bill, the plaintiffs obtained an order for the examination of the witness, and gave notice to the defendant, and of the interrogatories intended to be put; and on the same evening examined the witness, who left London the next day for a foreign country, and never returned. The plaintiffs obtained a farther order, that the de-

Depositions relating to a custom, or prescription, or pedigree, where reputation would be evidence, are admissible against strangers; for as the traditional declarations of persons dead would be admissible, *à fortiori*, their declarations on oath are so (x). Where, however, depositions relate precisely to the same issue (y), or are made *post litem motam*, they cannot be received (z). On the trial of a question between the lord of a manor and a copyholder, as to a custom insisted upon by the lord in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage to be equal to two years improved value, it was held, that depositions in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine, to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the copyholder, were admissible evidence for the lord, as depositions of persons standing *pari jure* with the new copyholders; it was not proved that the persons making such depositions were copyholders, but it appeared from the depositions themselves that they were such, or that they were persons acquainted with the custom of the manor. And it was held that their depositions, supposing them to be admissible only as declarations of persons deceased, were not inadmissible on account of their having been made *post litem motam*, because the same custom was not in controversy in the former suit as in the latter (a). Where, however, the *lis mota* was on the very point, the depositions and declarations of persons in respect of it would not be evidence, since it is doubtful whether the deposition

Depositions when evidence to prove reputation.

When admissible.

position of the witness should be published; and, upon the trial, it was held that the deposition might be read, since the defendant might have cross-examined, if he had been so inclined.

(x) B. N. P. 230. *Cort v. Birkbeck*, Doug. 219; 4 M. & S. 491, where Lord Ellenborough said, "These depositions, made by persons standing in *pari jure* or in *eodem jure*, I consider to be evidence, and so they have been considered in all times. The depositions furnish evidence not only against the parties making them, but against all persons who stand in the same relation, in the same manner, in all cases of customs, such as the custom to

grind at mills, as in the case of the *Settle Mill*.* Depositions of this kind have ever been received. I have heard them read twenty or thirty times on the circuit which I used to go, without objection; and I remember particularly, that in the case of the *Leeds Mill*, they were admitted as the depositions of persons standing in *pari jure*."

(y) Case of the *Berkeley Peerage*, 4 Camp. 401. Case of the *Banbury Peerage*, *infra*, 331. *R. v. Cotton*, 3 Camp. 444; 4 M. & S. 486.

(z) 4 M. & S. 486.

(a) *Freeman v. Phillips*, 4 M. & S. 486.

* See *Cort v. Birkbeck*, Doug. 219.

Depositions
when ad-
missible.

of witnesses selected and brought forward to support one side of the question, and who partake of the feelings and prejudices belonging to that side, can be depended upon as those of fair and impartial witnesses (b).

In the case of *Tooker v. The Duke of Beaufort*, the depositions as well as the return to the Exchequer under a commission to inquire whether the Prior of St. Swithin or the Crown was seised of certain lands upon the dissolution of the priory, were held to be admissible in evidence, and the depositions seem to have been considered as standing on the same footing with the return itself (c).

A deposition between any parties is evidence to contradict a witness (d), but it is not evidence to support the testimony of a witness (e).

Depositions
of witnesses
resident
abroad.

Where a witness is likely to be abroad at the time of the trial, the party who requires his testimony may move the Court in term time, or apply to a Judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse*, before one of the Judges of the Court, if he reside in town, or if in the country, or abroad, before commissioners specially appointed, and approved of by the opposite party, whose consent is essential. The Court, in furtherance of the application, where it is necessary, will put off the trial (f) at the instance of the defendant, if the plaintiff will not consent; and if the defendant refuse, the Court will not give him judgment as in case of a nonsuit (g). Where a witness

(b) See the observations of Bayley, J. 4 M. & S. 495.

(c) Burr. 148.

(d) 12 Mod. 918; 4 St. Tr. 265; 2 Haw. 430, s. 9. 12; 2 Keb. 384; Bac. Ab. Ev. 620. See *R. v. Buckworth*, Raym. 170. An examined copy is sufficient for this purpose. *Highfield v. Peake*, 1 M. & M. 110. A former deposition of the witness may be used to impeach his testimony, by showing omissions or variances which affect his capacity or honesty, but according to *The Queen's Case*, and the recent resolutions of judges, the deposition must be produced and shown to the witness, and is to be considered as evidence given for the prisoner. *Qu. whether a deposition may not be shown to witness to refresh his memory without making the deposition evidence.*

(e) What a man himself who is living

has sworn at one trial can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another, on the same inducements, B. N. P. 242. It is added that what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shows that what he swears is not from any undue influence. But if a man has sworn at one trial different from what he has sworn at another, this is good evidence to his discredit.

(f) *Furley v. Newnham*, Doug. 419. *Calliard v. Vaughan*, 1 B. & P. 211.

(g) Tidd's Prac. 852. The application, in the first instance, is for a rule or summons to show cause, upon an affidavit, stating that the witness is material, and that he resides or is going abroad. If the

was unable from illness to attend the trial, and was not likely to recover, leave was refused to examine him upon interrogatories, as to his attestation of a deed, although it was sworn that the defendant had at one time admitted the execution of the deed; and the Court also refused to dispense with the attendance of the witness upon the trial on such grounds (*h*).

Depositions
of witnesses
resident
abroad.

The stat. 13 Geo. 3, c. 63, s. 40 & 44, directs, that where an action is brought in any of the courts at Westminster, upon a cause of action arising in India, the Court may award a *mandamus* to the Judges of the courts of India for the examination of witnesses; and that the depositions, duly taken and returned, shall be deemed as good and competent evidence as if the witnesses had been sworn and examined *vivâ voce* (*i*).

India:
Examina-
tion of wit-
nesses in.

Adversary consent, the Court will make the rule absolute, or the Judge will make an order upon the summons. The interrogatories are then prepared, and are signed by counsel, and ought not to contain leading questions. A copy of the interrogatories is then given to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories if he think proper. At the time appointed, the witness is taken, together with the interrogatories, to the Judge's chambers, or before the commissioners appointed by the rule or order, where he is examined; and his depositions being sworn to, copies are made out, and delivered to the party requiring them. And as the depositions are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country at the time of the trial. The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office-copies of the depositions, but each party pays his own expenses, unless it be otherwise expressed in the rule. *Stephens v. Crichton*, 2 East, 259. And this holds with regard to witnesses examined abroad, as well as in this country. *Taylor v. Exchange Assurance*, 8 East, 392. *Muller v. Hartshorne*, 3 B. & P. 556. The reason is, that by the practice of the Court of Chancery, a party applying for a commission to examine witnesses in his behalf must pay the expenses; and unless the other Courts adopted the same rule with respect to the party applying for leave to examine wit-

nesses abroad on depositions, which cannot be done without the other party's consent, such consent would never be given, but the applicant would be driven to the expense of applying for a commission. The costs of the commission to examine witnesses abroad, were not allowed to the party who obtained the commission, although successful, the examination being peculiarly for his benefit. *Bridges v. Fisher*, 1 Bing. N. C. 510. A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and send the same to England; and to swear and interpret the depositions of such witnesses as did not understand the English language. It appeared by the return, that the depositions in the first instance were reduced into writing in the foreign language, and translated by the interpreter into the English language, within an interval of six weeks. Held, that the commission was well executed by the commissioners returning the depositions so translated into the English language. *Atkins v. Palmer*, 4 B. & A. 377. The costs of examining witnesses, whether at home or abroad, are usually to be paid by the party who obtains the rule. *Stephens v. Crichton*, 2 East, 259. *Taylor v. Exchange Assurance*, 8 East, 393. *Muller v. Hartshorne*, 3 B. & P. 556.

(*h*) *Jones v. Brewer*, 4 Taunt. 46.

(*i*) See *Francisco v. Gilmore*, 1 B. & P. 177. See also the case of *Atkins v. Pal-*

Bill to perpetuate.

Where a subject-matter is likely to be litigated in future, but cannot be made the subject of immediate investigation, a bill in equity lies to perpetuate the testimony of witnesses, in order to prevent the hardship which might accrue to a party from an inves-

mer, 4 B. & A. 377. *Supra*, note (g), and see the provisions of the late stat. 1 W. 4, c. 22, by which the provisions of the stat. 13 Geo. 3, c. 63, s. 40 & 44, are extended to all actions depending in any of his Majesty's courts of law at Westminster, wherever the cause of action may have arisen. Where *A.*, the captain of an Indian country trader, contracted in India with *B.* for a crew, according to the custom of the country, and *A.* arrived in England with the crew, and then made a voyage with them to the West Indies and back again, on an action being brought by one of the crew for wages due on the West India voyage, it was held, on a motion for a *mandamus* under the stat. 13 Geo. 3, c. 68, s. 44, that the cause of action did not arise in India. *Francisco v. Gilmore*, 1 B. & P. 177. Where the witnesses for a defendant indicted for a misdemeanor resided in Scotland, the Court obliged the prosecutor to consent to the examination of the witnesses before one of the Courts there. Per Lord Mansfield, *Mostyn v. Fabrigas*, Cowp. 174. It has been seen, that the objection which may be taken to depositions made in a cause then pending at the trial, that the questions were leading ones, is not applicable where the adverse party might have had them expunged, but has not done so, but has allowed the evidence to be exemplified. *Williams v. Williams*, 4 M. & S. 497. By the stat. 1 Geo. 4, c. 101, provision is made for obtaining the evidence of witnesses in India, to support a bill of divorce. Where prosecutions are founded on offences committed abroad, by persons employed in the public service, the evidence of witnesses may be obtained under the provision of the stat. 42 Geo. 3, c. 85. See *R. v. Jones*, 5 East, 31. See also the stat. 54 Geo. 3, c. 15, made for the purpose of facilitating the recovery of debts in the courts of law in New South Wales.

The Court of Exchequer has the same right as the Court of K. B. to issue com-

missions for examining witnesses in India, under 13 Geo. 3, c. 63, s. 44. *Savage v. Binny*, 2 Dowl. (P. C.) 643.

The commission for examination of witnesses in India under 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length. *Murray v. Launford*, 7 Sim. 139.

The defendant having, under the 13 Geo. 3, c. 63, s. 44, obtained depositions in India, the plaintiff is entitled to take copies of them at his own expense. *Davis v. Nicholson*, 7 Bing. 358; 5 M. & P. 185.

A party was refused leave to examine a co-plaintiff as a witness, on a reference to inquire what was due on a bond, upon giving security for costs. *Benson v. Chester*, Jac. 077.

The motion to examine *de bene esse*, is of course where the witness is above 70, is the only witness, or in a dangerous state, (*secus* where he is in a state of mere infirmity);—but the Court refused to shorten the time of notice (three days) of the intention to examine. *Tomkins v. Harrison*, 6 Mad. 315. Where a witness resides abroad, at such a distance as would occasion great delay of a commission to examine were granted, it must be made out very clearly and satisfactorily to the Court, not only that the witness is expected to give evidence material and necessary, but also that it is admissible. *Lloyd v. Key*, 3 Dowl. 253. In ordinary cases the affidavit in support of the application for an examination of witnesses abroad need not state that the evidence was admissible, nor that the application was made *bonâ fide*, and not for delay, nor that there were merits, nor will the Court impose terms upon the party applying. *Baddley v. Gilmore*, Cr. M. & R. 55; and 1 Tyrw. & Gr. 309. The affidavit in support of a commission to examine witnesses abroad must name or otherwise describe in some way the parties intended to be examined. *Gunter v. M'Tear*, 3 Cr. M. & R. 201; 1 Tyrw. & Gr. 245; and 4 Dowl. 722.

figation at a remote period, when death had *deprived him of his witnesses (*l*). Bill to perpetuate.

Where an old witness has been examined, it is sometimes made part of the rule for a new trial that the Judge's note of his evidence shall be read upon the new trial (*m*).

A bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, is demurrable, unless it aver that an action is pending (*n*).

The Court will not grant a mandamus to justices of the peace to produce depositions taken on a charge of felony, in order to ground a prosecution for perjury (*o*). But the magistrate may be subpoenaed before the grand jury, who may found a presentment on his evidence (*p*).

By the stat. 1 Will. 4, c. 22, reciting that it is expedient to extend the powers and provisions of the stat. 13 Geo. 3, c. 63, it is enacted, sec. 1, that the powers of that Act shall be extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts, and to the Judges of the courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, wherever the cause of action may have arisen, whether within the jurisdiction of the court, &c. or elsewhere, when it shall appear that the examination of witnesses (*q*), under a writ or commission (*r*) issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice (*s*).

General provisions of the st. 1 W. 4, c. 22.

By sec. 2, the Judge or Judges to whom any such writ or commission shall issue, shall have like power to compel and enforce the

(*l*) See *Angell v. Angell*, 1 Sim. & St. 80. The bill will be defective unless it state that the matter in question cannot be made the subject of immediate investigation. Ibid. See also *Dew v. Clarke*, 1 Sim. & St. 114.

(*m*) *Shillito v. Claridge*, 2 Ch. 426.

(*n*) *Angell v. Angell*, 1 Sim. & St. 91. But see *Moodalay v. Morton*, 2 Dick. 652; 1 Bro. P. C. 409; *Dub. Phillips v. Carew*, 1 P. Wms. 117.

(*o*) 1 Chitty, 627.

(*p*) Ibid.

(*q*) The Court, on application to examine witnesses abroad, refused to direct the plaintiff to produce certain bills at the examination. *Cunliffe v. Whitehead*, 3 Dowl. P. C. 634.

(*r*) The Court permitted a commission to examine foreign witnesses to be issued

without requiring an oath from the commissioners, authorizing them to apply to the local tribunal, to compel attendance of witnesses, to render such commission effectual; but refused to make any special order as to the costs of such a rule. *Clay v. Stephenson*, 5 Nev. & M. 318.

(*s*) It is no ground for staying a commission to examine witnesses abroad, that the costs of a suit in equity relating to the same matter are unpaid. *Oughnan v. Parish*, 4 Dowl. P. C. 29. *Quere*, whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary under the statute. If so, it must be shown by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause. *Abraham v. Newton*, 8 Bing. 274.

attendance and examination of witnesses, as the court whereof they are Judges does for that purpose, in causes depending in that court(t).

Sec. 3. Costs of every such writ or commission are to be in the discretion of the court issuing the same.

Examina-
tion under
the stat.
1 W. 4,
c. 22.

Sec. 4. Witnesses may be ordered by the courts and the Judges thereof, upon application of the parties to the suit, to be examined upon interrogatories before any of the officers of the court, if within the jurisdiction, otherwise by commissioners.

Sec. 5. The court making any such order may compel the attendance of witnesses and production of documents; disobedience of order to be deemed a contempt of court. Witnesses entitled to expenses. No document to be produced but such as would be produceable on trial.

Sec. 6. The court may issue a *habeas corpus* for the examination of prisoners.

Sec. 7. Examinations to be taken on oath. Persons giving false evidence to be guilty of perjury.

Sec. 8. A special report to be made by commissioners as to the conduct or absence of witnesses, if necessary.

Sec. 9. Costs of every order and proceedings thereupon (except as before provided for) to be costs in the cause, unless otherwise directed by the Judge or court.

Sec. 10. No examination to be read without consent of the party against whom the same may be offered, unless the witness be beyond the jurisdiction of the court, dead, or unable to attend; in which cases the examination, certified by the commissioner, shall be read in evidence, saving all just exceptions.

Sec. 11. No order shall be made by a single Judge of the county palatine of Durham who shall not also be a Judge of one of the courts at Westminster.

How
proved.

The preparatory facts must first be proved which warrant the reception of the evidence, as that the witness is dead, insane, or absent, unless lapse of time negative his existence (u). Where a deposition, 39 years old, represented the witness to be 60, it was held that it could not be read without proof of his death (x). Next it must be proved that such a cause existed, and between the same parties, in order to show the admissibility of the oath of the witness; for if no legal cause existed, the oath was nothing more than

Existence
of cause.

(t) A commission to examine witnesses directed to the members of the Court of Commerce at Hamburg without the usual clause requiring the commissioners to be

sworn, was allowed. (*Littledale, J., dub.*) *Clay v. Stephenson*, 3 Ad. & Ell. 807.

(u) *Benson v. Olive*, in Scacc. Str. 920, where the deposition was 60 years old.

(x) 1 Ford's MSS. 146; Str. 920; *qu. et vid. supra*, 310.

a voluntary affidavit (y). Although the bare production of the *postea*, without proof of final judgment, be no evidence of the verdict, for judgment may have been arrested, or a new trial granted, yet it is good evidence that a trial was had between the same parties, so as to introduce the evidence of a witness (who is since dead) at the trial (z). And so it is on an indictment for perjury (a).

Existence
of lawful
cause.

Where a rule of Court had been made, by consent of the parties, that the Judge's notes, and the shorthand writer's notes of the evidence given at the trial of a former issue between the same parties of witnesses, since dead, should be read at the trial of the (then pending) ejectment, the Court (b) held, that the lessor of the plaintiff was precluded from objecting that the evidence of Mr. Bleasdale, an attesting witness to the will under which the defendant claimed, and who was since dead, should be read in evidence; and that such evidence being admissible, was direct and immediate evidence sufficient to prove the will, although another witness to the will was present at the trial, but was not called as a witness in the cause (c).

Where the deposition has been taken in Chancery it is necessary to prove the bill and answer (d), in order to show the existence of a lawful cause, and that the depositions relate to the same matter. And therefore, exemplified depositions in the Duchy Court were held to be inadmissible, because the answer was not exemplified (e). But where the Court of Chancery makes an order, on directing an issue at law, that the depositions shall be read, proof of the bill and answer are unnecessary (f). And where the bill and answer have been lost, they may be supplied by other memorials (g). And ancient depositions have been admitted without proof of the bill and answer, because formerly they were not

(y) B. N. P. 242; 1 Ray. 730; 12 Vin. Ab. Ev. A. b. 61, Pl. 16.

(z) B. N. P. 243; 1 Str. 162.

(a) B. N. P. 249. *R. v. Iles*, M. 14 G. 2, cor. Raymond.

(b) *Wright v. Doe d. Tatham*, in the Exchequer Chamber, in error. 2 Ad. & Ell. 3. See tit. BEST EVIDENCE, and Vol. II. tit. WILL.

(c) Note, that it was not contended at the trial or afterwards on the part of the lessor of the plaintiff that the evidence was not admissible; but that although admissible, it did not dispense with calling the surviving witness.

(d) *Dutton's Case*, Trial at Bar, Ray. 335; Vin. Ab. Ev. A. b. 31, pl. 12; Gilb. Ev. 56; B. N. P. 240. *Illingworth v. Leigh*,

4 Gwill. 1619. *Byam v. Booth*, 2 Price, 234, n. *Baker v. Sweet*, Bunb. 91. If the bill is dismissed for informality, see 2 P. Wms. 162.

(e) Clay, 9; Vin. Ab. Ev. A. b. 31.

(f) But the order is not made for the purpose of making that evidence in a court of law, which would not otherwise be admissible. *Palmer v. Lord Aylesbury*, 15 Ves. 176. *Corbet v. Corbet*, 1 Ves. & Beames, 340; and therefore proof that the witnesses themselves cannot attend is necessary. Where there is no such order the bill and answer must be proved, as in ordinary cases.

(g) *Barly's Case*, 5 Mod. 210; Vin. Ab. Ev. A. b. 36, pl. 33.

Existence
of lawful
cause.

enrolled, and were liable to be lost (*h*). The depositions may be used although the bill has been dismissed,⁷ on the ground that the Court considered the matter unfit for a decree in equity (*i*). Where evidence has been given upon the trial of an issue directed by a court of equity, upon a bill filed by a party, it is no objection to the receiving the evidence of a witness examined on the trial of that issue upon the trial of an ejectment between the same parties, that the bill has since been dismissed (*k*). Depositions taken by order of Queen Elizabeth, on petition, without bill and answer, were allowed to be read (*l*).

Identity of
deponent.

In ordinary cases, it seems to be sufficient to prove that the deposition was signed by the Master; but upon an indictment for perjury the identity of the deponent must be strictly proved (*m*).

Proof by
copy, &c.

A deposition may be proved by an examined copy (*n*); office copies, though admissible in equity, are not admissible in a court of law. Upon the trial of an issue directed by the Court of Chancery to try the validity of an alleged deed of gift, it was held that an office copy of a deposition made by the plaintiff's brother in the suit in equity, and which was proved to have been examined with the original, was admissible to contradict the witness (*o*). The party reading the deposition must, as part of his own case, read also the answers to the cross interrogatories (*p*). And he cannot read part of a series of interrogatories, abandoning the rest (*q*). Upon a trial of an issue at law, directed

(*h*) 2 Keb. 31; Law. Ev. 113. 65, 2d ed. *Ryam v. Booth*, 2 Price, 231. *Illingworth v. Leigh*, 4 Gwill. 1615. *R. v. Countess of Arundel*, Hob. 112. Depositions taken under a commission issuing out of the Exchequer, cannot be read without producing the commission, unless they are of so long standing as to afford a presumption that the commission is lost. *Bailey v. Wylie*, 6 Esp. 85. But per Lord Ellenborough, if the commission be produced, it is not necessary to produce the bill and answer upon which the commission was granted. *Ibid.* Answers to interrogatories may be used as admissions, although some of the answers are not intelligible of themselves. *Rouse v. Brenton*, 8 B. & C. 762.

(*i*) *Hall v. Hoddesdon*, 3 P. W. 162.

(*k*) *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 3.

(*l*) Hob. 112.

(*m*) 3 Mod. 116, 117. See tit. PERJURY. *Ld. Holt*, in one case (*Ld. Raym.* 734), held that it should be proved by the ex-

aminer that the depositions were taken on the day of their date.

(*n*) *Gillb. Ev.* 21; B.N.P. 229; *Starkie's C.* 13.

(*o*) *Highfield v. Peake*, 1 M. & M. C. 109, cor. *Littledale, J.*, who said, that this being an issue out of Chancery might be considered as a proceeding in that court, and therefore that the office copy, according to the case of *Dunn v. Fulford*, 2 Burr. 1179, might be considered to be good evidence. In the case of *Rees d. Howell v. Brown*, 1 M. & Y. 383, the Court of Exchequer is reported to have held that an examined copy of an affidavit, made for the purpose of obtaining an injunction, was not admissible; but see 1 M. & M. C. 111. *Ewer v. Ambrose*, 4 B. & C. 25; *Hennel v. Lyon*, 1 B. & A. 182.

(*p*) *Timperly v. Scott*, 5 C. & P. 341.

(*q*) *Wheeler v. Atkinson*, 5 Esp. C. 246. Even although the answers state the contents of writings inadmissible in evidence. *M'Intyre v. Layard*, R. & M. 203.

by the Court of Chancery, depositions will be allowed to be read, under an order of the Court of Chancery, without proof of the bill and answer (r). Such an order is not made for the purpose of making that evidence which would not otherwise be admissible (s); and depositions under such an order are not admissible without proof at the trial that the deponents cannot attend in person. Where the evidence of a witness upon a former trial is adduced, the evidence itself must be proved on oath (t). And in *Lord Palmerston's Case* the evidence was rejected, because the witness could give the effect only of the evidence, and not the words (u). Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn, was held to be admissible, notwithstanding an order for reading the depositions in equity of such witnesses as had died since the first trial (x). The copy of the deposition of a person examined upon interrogatories at the Chief Justice's chambers, signed by the Chief Justice, and received from his clerk, must be taken *prima facie* to be a correct copy of what has been sworn by such witness; and the original examination need not be produced until some suspicion of forgery is thrown upon the signature of the deponent (y). Where the deposition has been taken under the statute 7 Geo. 4, c. 64, it must be shown that the requisites of the statute have been complied with (z).

Proof by
copy, &c.

It is no objection that the interrogatories were leading ones, where the party might have objected (a).

Where the interrogatories to certain tenants at assize session courts, upon proper search could not be found, it was held that the answers might be read, subject to the consideration, whether their effect would not be destroyed by any ambiguity which might arise from the want of those questions (b).

Depositions taken in ecclesiastical causes before courts of competent jurisdiction are admissible on the same principles which

(r) *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Corbet v. Corbet*, 1 Ves. & B. 340.

(s) 15 Ves. 176. But see *Doe v. Wright*, 2 Ad. & Ell. 3, *supra* 325.

(t) 1 Sid. 325; Law of Ev. 31; Bac. Ab. Ev. 629. The evidence of a witness upon the former trial may be proved either by the Judge's notes, or on oath, by the notes or recollection of any person who heard it. *Mayor of Doncaster v. Day*, 3 Taunt. 262.

(u) But *qu.* whether so great exactness is necessary; even an indictment for perjury sets out the substance only. Where

the witness deposing as to what the defendant swore on a trial, stated that he could not swear he had stated all which fell from the prisoner, but would swear that he had said nothing to qualify it; it was held to be sufficient. *Rowley's case*, 1 Ry. & M. 111.

(x) *Tod v. Earl of Winchelsea*, 3 C. & P. 387.

(y) *Duncan v. Scott*, 1 Camp. 169.

(z) See tit. ADMISSIONS.

(a) *Williams v. Williams*, 4 M. & S. 497.

(b) *Rowe v. Brenton*, 8 B. & C. 765.

Proof by
copy, &c.

warrant the receiving such evidence in other cases (c). There are indeed several cases to the contrary, but as these are founded principally upon the objection that ecclesiastical courts are not courts of record; and partly on the objection that their proceedings are governed by the rules of the civil law, it seems to be unnecessary to discuss them at length. The reception of depositions in equity is an answer to the first objection; and, as to the second, it may be answered, that the principles on which depositions in other causes are held to be receivable in courts of common law, are quite independent of the use to be made of such depositions. It is sufficient that the court possesses jurisdiction (d) such as to warrant the punishment of one who swears falsely, and that the adverse party had due notice and opportunity to be at all the examinations and cross-examine the witnesses. Upon the same principles, it seems that a deposition before commissioners of excise having power to inquire as to forfeitures, is admissible upon an appeal, in case of the death of the deponent (e).

Writs,
warrants,
&c. when
evidence.

For what
purposes
admissible.

Thirdly, as to writs, warrants, pleadings, and bills and answers in Chancery, and other documents incidental to judicial proceedings.

Writs and warrants are in general evidence to show the mere fact of their existence, whenever it becomes material, against all the world; for the issuing or existence of a writ is a mere fact. A writ is evidence to prove the commencement of the action, in opposition to the memorandum or title of the record. Thus where the proceeding was by original, or in the Common Pleas, the writ was evidence to show that the action was commenced earlier than it appeared to have been by the record, which was intitled of the term in which issue was joined (f). Accordingly, where in an action on an attorney's bill in that court, it appeared that the bill had been delivered September 30th, 1797, and the record was entitled of Hilary, 1798, it was held to be incumbent on the defendant to show by the writ that the action had been in fact commenced before the expiration of the month (g). So the plaintiff, in order to save the statute of limitations, or a tender, might give in evidence a bill of Middlesex, or *latitat* (h). Where the cause of action appeared in

(c) Gilbert's Ev. 60.

(d) Depositions in a cause, in the Spiritual Court relating to land cannot be read, because they are no oath at all, inasmuch as the Spiritual Courts have no authority to take depositions relating to lands. Gil. Ev. p. 60.

(e) According to the opinion of Lord Holt in *Bredon v. Gill*, 1 Lord Ray, 210.

(f) 3 B. & P. 263.

(g) *Webb v. Pritchett*, *ibid*.

(h) 1 Sid. 58. *Dacy v. Church*, *ibid*. 60. *Welden v. Grey*, 1 Str. 550. *Hollister v. Coulson*, 2 Str. 736. *Crohatt v. Jones*, 2 Burr. 961. *Johnson v. Smith*, 2 Burr. 1243. *Morris v. Pugh*, Cowp. 445. And see Vol. II. tit. LIMITATIONS—TIME.

evidence to have arisen after the first day of the term, and there was no special memorandum, the plaintiff might show by the production of the writ that it was issued after the cause of action had in fact accrued (*i*); for in general a *latitat* might be considered by the plaintiff either as the commencement of the action or as process (*k*). In the Common Pleas the production of the *capias ad respondendum* proved the commencement of a penal or of any other action (*l*). Where to a plea of tender, or the statute of limitations, the plaintiff replied an original sued out within the time, the production of the *capias ad respondendum* was held to be evidence of it, for the Court would presume it (*m*).

For what purposes admissible.

Where goods are seized under a *feri facias*, if the defendant himself bring an action, it will be sufficient for the bailiff to prove the writ; but if the action be brought by a person claiming by virtue of a prior execution, or a sale which was fraudulent, the bailiff must prove the judgment as well as the writ; for, in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he shows that he has committed no trespass; but in the latter cases, they are not the goods of the party against whom the writ issued, and the officer is not justified in taking them unless he can bring the case within the stat. 13 Eliz., for which purpose it is necessary to show a judgment (*n*). Accordingly, where *A.* brought an action of trespass against the sheriffs, who proved a *feri facias* against the goods of *B.*, but did not prove a copy of the judgment; after a verdict for the plaintiff upon the point reserved, the Court held that the judgment ought to have been proved; but because it appeared that the goods were in fact the goods of *B.*, and that his conveyance of them to *A.*, *B.* himself remaining in possession of them, was fraudulent, the Court granted a new trial (*o*).

Effect of the writ in evidence.

Where in ejectment the lessor of the plaintiff claimed under a sale upon a *feri facias*, in an action by himself against the defendant in ejectment, the Court held that he was bound to prove the

(*i*) 3 Burr. 1241; 1 Bl. 312.

(*k*) *Wood v. Newton*, 1 Wils. 141.

(*l*) 2 Bl. R. 924, 925. *Leader v. Moxon*, 3 Wils. 461; 1 Lord Raym. 434; Willes' R. 255. *Karver v. James*, *contra*. 1 Lord Raym. 553. *Mors v. Benerton*, 2 Lord Raym. 880. *Gosling v. Witherspoon*, Sitt. after Mich. 1788.

(*m*) *Gosling v. Witherspoon*, per Lord Kenyon, Sitt. after Mich. 1788.

(*n*) B. N. P. 234. The writ itself is a

justification for seizing the goods of the defendant; but if those goods be claimed by another under a colourable title, the officer must show that the act of transfer was fraudulent, and therefore void as against a judgment-creditor; and therefore must show that a judgment existed.

(*o*) *Martyn v. Podger*, Burr. 2631; and see *Lake v. Billers*, Lord Raym. 733. See also *Ackworth v. Kemp*, Doug. 40.

Effect of
the writ in
evidence.

judgment as well as the writ (p). In order to prove the crime of murder against a party who kills an officer in the execution of civil mesne process, it is necessary to prove the writ of as well as the warrant from the sheriff (q). And so it is in case of a justification by an officer in the execution of such process (r). Upon issue taken on a plea of *plene administravit*, proof of the execution is not evidence without the judgment, for without it there appears to be no authority for the execution (s).

Sheriff's
return on
a writ.

As the sheriff is a public officer and minister of the Court, credit is given to the statement upon his return, as to his official acts. Thus in the case of *Gyfford v. Woodgate* (t), in an action for maliciously suing out an *alias fieri facias*, after a sufficient levy under the first, it was held, that the sheriff's return upon the two writs which had been produced in evidence by the plaintiff, as part of his case, in which the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff himself, were *prima facie* evidence of the facts so returned. So if the sheriff return a rescue, the Court will so far give credence to such return as to issue an attachment in the first instance; though upon an indictment for a rescue it would be open for the defendant to show that the return was false (u). The sheriff's return is no proof that he has paid over the money levied to the execution creditor (x); his indorsement on the writ is evidence against himself (y).

Writs,
proof of.

The writ either has been returned, or it has not; if it has been returned, it is a record, and should be proved in the same manner as any other record (z). If the writ has not been returned the original should be produced.

A writ, if not returned, is proved by the mere production; when it has been returned, it may be proved by an examined copy (a). The judgment-roll is incontrovertible evidence of all the proceedings which it sets forth, therefore it is evidence of the issuing an *elegit*, and of the return to the writ, in an action for use and occupation, by the plaintiff claiming under an *elegit* (b). When the

(p) *Doe on dem. Bland v. Smith*, 2 Starkie's C. 199. For the effect of writs and warrants, &c. in evidence, as a justification of the officer, &c., see OFFICER, HOMICIDE, &c.

(q) *R. v. Mead*, cor. Wood, B. 2 Starkie's C. 205.

(r) 3 Lev. 63.

(s) Per Holt, J., Tri. per Pais, 227.

(t) 11 East, 296.

(u) *R. v. Elkins*, 4 Burr. 2129.

(x) *Cator v. Stokes*, 1 M. & S. 599.

(y) See tit. SHERIFF, and *Martin v. Bell*, 1 Starkie's C. 413.

(z) Vide p. 224, et seq.

(a) *Supra*, 224.

(b) *Ramsbottom v. Buckhurst*, 2 M. & S. 567.

writ is mere matter of inducement, it may be proved by the production of the writ itself (c), without a copy of the record; for possibly it may not have been returned, and then it is no record; but where a record is the gist of the action a copy from the record is necessary, because that is the best evidence. To prove an allegation, that the defendant issued a writ against *A. B.*, it is not sufficient for the plaintiff to show the entry of a *præcipe* in the filazer's book, and after proving notice to the defendant to produce it, to give in evidence a copy; it should be shown that search was made for it in the Treasury, and that after the return of the writ, it was in the hands of the defendant (d).

Writs,
proof of.

A bill in equity is always evidence for the purpose of proving as a fact, that such a bill has been filed. But a bill in equity is not admissible, as it seems, in any case, even against the plaintiff himself, or those who claim through him, as to any facts alleged in the bill, even although they relate to matters of pedigree (e). In the case of the *Banbury Peerage*, all the Judges held that, generally speaking, a bill in Chancery cannot be received as evidence in a court of law to prove any fact, either alleged or denied in such bill, although it relate to matter of pedigree, and be of considerable antiquity, whether the object of the bill be to perpetuate testimony or to obtain relief (f).

Bill in
equity,
when evi-
dence.

(c) B. N. P. 234; Gil. Law. Ev. 34.

(d) *Edmonstone v. Plaisted*, 4 Esp. C. 160. The sheriff's book is not evidence of the contents of a writ. *Russel v. Dickson*, 6 Bing. 442.

(e) *Case of the Banbury Peerage*, 23 Feb. 1809, 2 Sel. N. P. 712. *Doe v. Sybourn*, 7 T. R. 3; see *Taylor v. Cole*, 7 T. R. 3, n., where Lord Kenyon, at the sittings after Hil. Term, 1799, is stated to have held, "that a bill in Chancery, filed by an ancestor, was evidence to prove a family pedigree, in the same manner as an inscription on a tombstone, or in a Bible. But see Com. Dig. Ev. C. 2. *Devon v. Jones*, 2 Anst. 505. It was formerly held, that a bill in equity was admissible evidence against the plaintiff in equity where his privity could be proved, although the bill had not been acted on, and without proof of privity if the bill has been acted on. Ch. C. 64, 65. *Snow v. Philips*, 1 Sid. 221; Eq. Ca. Ab. 227, pl. 1; B. N. P. 235; Fitzg. 196. *Bowerman v. Sybourn*, 7 T. R. 3.

(f) In the case of the *Banbury claim of Peerage*, D. P. 23d Feb. 7, 1809 (cited 2 Sel. N. P. 712), the counsel for the petitioner stated, that he would offer in evidence certain depositions taken upon a bill (seeking relief), filed in the Court of Chancery on the 9th February 1640, by Edward, the eldest son of the first Earl of Banbury, an infant, by his next friend. This evidence having been objected to, and the point argued, the following questions were proposed to the Judges:

Upon the trial of an ejectment brought by *E. F.* against *G. H.* to recover the possession of an estate, *E. F.*, to prove that *C. D.*, from whom *E. F.* was descended, was the legitimate son of *A. B.*, offered in evidence a bill in Chancery, purporting to have been filed by *C. D.* 150 years before that time, by his next friend, such next friend therein styling himself the uncle of the infant, for the purpose of perpetuating testimony of the fact that *C. D.* was the legitimate son of *A. B.*, and which bill stated him to be such legi-

Answer in
Chancery,
when evi-
dence.

An answer in Chancery is evidence as an admission upon oath (*g*), but it is not evidence except against the party who made it, or to contradict his testimony in another cause (*h*); for with respect to others, it is *res inter alios* (*i*). If a man make an answer in Chancery which is prejudicial to his estate, it is not evidence against his alienee (*k*); unless, indeed, the plaintiff make

timate son (but no persons claiming to be heirs at law of *A. B.*, if *C. D.* was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from *A. B.*, reserving rent to *A. B.* and his heirs); and also offered in evidence depositions taken in the said cause, some of them purporting to be made by persons styling themselves relations of *A. B.*, others styling themselves servants in his family, others styling themselves to be medical persons attendant upon the family; and in their respective depositions stating facts, and declaring that *C. D.* was the legitimate son of *A. B.*, and that he was in the family, of which they were respectively relations, servants, and medical attendants, or reputed so to be.

First question: Are the bill in equity, and the depositions respectively, or any, and which of them, to be received in the courts below upon the trial of such ejectment (*G. H.* not claiming, or deriving in any manner, under either the plaintiff or defendant in the said Chancery suits), either as evidence of facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; and are they, or any, and which of them, evidence to be received in the said cause, that the parties filing the bill and making the depositions, respectively sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining?

Answer: Neither the bill in equity, nor the depositions, are to be received in evidence in the courts below, on the trial of the ejectment, either as evidence of the facts therein (alleged, denied, or) deposed to, or as declarations respecting pedigree; neither are any of them evidence that the parties filing the bill, or making the depositions respectively, sustained the characters of uncle, relations, servants, and me-

dical persons, which they describe themselves therein sustaining.—The Judges further added, that it would not make any difference in their opinion, if the bill, stated to have been filed by *C. D.*, by his next friend, had been a bill seeking relief.

Second question: Whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill?

Answer: Generally speaking, a bill in Chancery cannot be received as evidence in a court of law, to prove any fact, either alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the Judges could not undertake to say.

Third question: Whether depositions taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?

Answer: Such depositions would not be received in evidence in a court of law, in any cause in which the parties were not the same as in the cause in the Court of Chancery; or did not claim under some or one of such parties. From 2 Sel. N. P. 712.

(*g*) Gil. L. E. 106; Godb. 326.

(*h*) *Ever v. Ambrose*, 6 D. & R. 127. An examined copy of the evidence is in such case sufficient. Ibid.

(*i*) *Goodright v. Moss*, Cowp. 591.

(*k*) Salk. 286; B. N. P. 238; although it be made before alienation. *Ford v. Lord Grey*, 6 Mod. 44. But see *Countess of Dartmouth v. Roberts*, 16 East, 344, *infra*, 286. An answer in Chancery relating to an advowson, filed by a person

it evidence by producing it first (*l*). As where in an issue out of Chancery to try the terms of an agreement which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, and it was read for the defendant (*m*). So the answer of an infant by guardian cannot be read against him on a trial at law (*n*), for the law out of tenderness to infants will not permit them to be prejudiced by the oath of a guardian (*o*); but it seems that the answer of the guardian for the infant may afterwards be used as evidence against himself, for it is the answer of the guardian and not of the infant (*p*). The same objection does not seem to apply to an answer made by a woman during coverture, if offered in evidence after the death of the husband. In the case of *Wrottesley v. Bendish* (*q*), the Lord Chancellor said that he would give no opinion on the point, whether such an answer would be evidence or not (*r*). But in the case of *Hodson v. Merest* (*s*), it was held that the joint answer of the husband and wife could not be read against the wife. The ground of objection to admitting such an answer seems to be, that the wife was at the time under the dominion of the husband, and not a free agent; but if the answer was adverse to the interest of the husband, a presumption of duress cannot arise. An answer by one defendant is not evidence against another, for no one is bound by the acts or declarations of another without his privity (*t*). But an answer by

When
admissible.

formerly seised of it, and through whom the party against whom it was sought to be used, but made twenty years after the former had conveyed away his interest, held inadmissible. *Gully v. Bishop of Exeter*, 5 Bing. 171, and 2 M. & P. 266. See *Deady v. Harrison*, 1 Starkie's C. 60. The distinction seems to be between mere collateral representations and those which possess a legal effect and operate in law, or are acts accompanying the possession, for such, as in the case of tenants, &c. seem to be always admissible.

(*l*) B. N. P. 238.

(*m*) *Bourne v. Sir T. Whitmore*, Salop, 1747.

(*n*) 2 Vent. 72; 3 Mod. 259. *Eccleston v. Petty*, Carth. 79. As to an admission by guardian, see *Cowling v. Ely*, 2 Starkie's C. 306; but see Str. 548. But an answer purporting to be the answer of a minor by his mother and guardian, may be

read against the mother in a cause which she defends in a different capacity. *Beasley v. Magrath*, Schoales & Lefroy's Rep. 34.

(*o*) Gil. L. Ev. 51; 2 Vent. 72; 3 Mod. 259; Carth. 79; Salk. 350; Vern. 60. 109, 110.

(*p*) 3 P. Will. 237; Carth. 7. 9. *Beasley v. Magrath*, *supra*, note (*z*).

(*q*) 3 P. Wms. 235.

(*r*) It was objected, that an answer by the wife, whilst under the power of the husband, would be of no more use than the answer of an infant.

(*s*) 9 Price, 556. See *Barrow v. Guildard*, 3 Ves. & Beames, 106.

(*t*) Vide tit. ADMISSIONS—PARTNERS. *Wyck v. Mead*, 3 P. Wms. 311; 12 Ves. 361. Upon a question of the right of a lord of a manor to wreck, held, that the answers of persons, some tenants of the manor, to a commission issued by a former

When
admissible.

one partner is evidence against another as to partnership liabilities, since there is a privity and community of interest, and each, for such purposes, is the agent of the other; since, however, this depends on the privity of interest, the partnership must be proved *aliunde* (u). So the answer of a party is evidence against one who claims under him. Thus, in an action for not setting out tithe, copies of a bill and answer, in a suit by the vicar for tithe-hay against S. L., then owner and occupier of the close, and from whom the defendant purchased, denying the vicar's right, and setting up a right in the ancestor of the plaintiff, were held to be evidence against the defendant (x).

The whole
of an an-
swer is
evidence.

It is a general rule, that the party who reads an answer makes the whole of it evidence (y); for it is read as the sense of the party himself, which must be taken entire and unbroken. Hence, if upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer (z). But where the evidence of a witness is read merely in order to show that he is incompetent, the whole is not evidence, but only so much as will show that he is incompetent (a). Although the whole of an answer must in general be read, the rule decides nothing as to the credibility of any fact

lord, stating the title of the lord, were inadmissible, the right being of a private nature, and the parties making the declarations possessing no peculiar means of knowledge. *Talbot v. Lewis*, 1 Cr. M. & R. 495; 5 Tyrw. 1; and 6 C. & P. 605.

(u) See tit. ADMISSIONS—PARTNERS; and *Wood v. Braddicke*, 1 Taunt. 104. *Lucas v. De la Cour*, 1 M. & S. 250. *Grant v. Jackson*, Peake's C. 203.

(x) *Countess of Dartmouth v. Roberts*, 10 East, 334; although the vicar abandoned the suit, and no decree was made. Lord Ellenborough in that case observed, "This appears, to me not to be *res inter alios*, but *inter eosdem acta*, and was not only evidence, but strong evidence against the defendant, who stood in the same place by derivation of title and legal obligation as the former occupier of the same land; and that former owner, on his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector and not to the vicar; and now that same person in effect, (that is, the present owner, who purchased of the former owner the very lands over which tithes are now claimed),

is decrying the title of the rector in favour of the vicar." See also *Benson v. Olive*, 2 Gwill. 701. *Earl of Sussex v. Temple*, 1 Lord Ray. 310. *Travis v. Chulover*, 3 Gwill. 1237. *Ashby v. Power*, ib. 1259; and tit. DEPOSITIONS.

(y) *Barne v. Whitmore*, Bac. Ab. Ev. 622. *Earl of Bath v. Battersea*, 5 Mod. 9. *Lynch v. Clarke*, 3 Salk. 153. See *Bermon v. Woodbridge*, Doug. 757, *supra*. And *Partington v. Butcher*, 6 Esp. C. 66. and tit. LIMITATIONS. *Earl of Montague v. Lord Preston*, 2 Vent. 170. *Randle v. Blackburn*, 5 Taunt. 245. *Pennell v. Meyer*, 2 M. & R. 99. Where the plaintiff in equity reads a passage in the answer as evidence of a particular fact, the defendant cannot read subsequent matter, although connected by conjunctive particles, unless it be explanatory of the passage read by the plaintiff. *Davis v. Spurling*, 1 Russ. & M. 68. See also B. N. P. 238; 2 Vent. 194; 1 Ch. Ca. 194; Gil. Ev. 44.

(z) B. N. P. 237. *R. v. Carr*, 1 Sid. 418.

(a) *Sparing v. Drax*, 27, c. 2, C. B. Trial at Bar, Bac. Ab. Ev. 622.

which it contains, and this must depend upon circumstances. Where the answer charges the defendant by the admission of one fact, and also discharges him by the statement of a distinct and further fact, the rule has been said to be, that what is admitted need not be proved by the plaintiff, but the defendant must make out his fact in discharge (*b*); and therefore where the executor, in an answer to a bill by creditors for an account of the personal estate, admitted the receipt of 100 *l.*, but alleged that it had been given to him by the testator, for his trouble in the testator's business, it was held, that the defendant was bound to make out, by proof, that which he insisted upon by way of avoidance; since it was probable that he admitted the fact out of apprehension that it might be proved, and therefore it ought not so far to profit the party as to give credit to the statement in avoidance. But the distinction was taken, that if the admission and discharge had been one entire fact, as, if the defendant had said that the testator had given him 100 *l.*, it ought to have been admitted, unless disproved; because nothing of the fact charged was admitted (*c*). In courts of law, however, the rule is, that if a party read the defendant's answer, the effect is to waive the objection which might otherwise have been made on the score of competency, and to submit the credibility of all the facts stated to the consideration of the jury (*d*); but it will not, it seems, operate to make a statement evidence which is in itself inadmissible; as, where it rests upon mere hearsay by the party who made the answer (*e*).

The scope of an answer is evidence.

A copy of a letter written by the plaintiff's agent, and referred to in an answer by the plaintiff to a bill of discovery filed by another party, in which suit the original letter was not filed, but the copy in question was delivered by the plaintiff's solicitor to the plaintiff's solicitor in the suit for discovery, may be read in evidence without reading the plaintiff's answer (*f*).

(*b*) In Equity, B. N. P. 237. Where a party (in equity) reads a passage from the defendant's answer, he reads all the facts stated in that passage; if it refer to any other passage, or facts stated in any other passage, that must be read, but only for the purpose of explaining the former; and if new facts are stated in the passage so referred to, which must in grammatical construction be read for the purpose of explanation, the facts and circumstances so introduced are not to be considered as read. *Bartlett v. Gillard*, 3 Russ. 157.

(*c*) B. N. P. 237. Per Cowper, C. Hil. Vac. 1707.

(*d*) *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542.

(*e*) See *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542, and the observations of Chambre, J., 2 B. & P. 548; Gil. Ev. 44.

(*f*) *B.*, an underwriter, filed a bill of discovery against *A.*, an assured, and *W.*, his agent, who had effected the insurance; *A.* and *W.* put in their answers, in which they referred to a letter written by *W.* on the subject of the insurance. The original was not produced, but to save time and expense it was agreed that a copy should be inspected, which was done, and a copy taken by the underwriter. On an action

Proof of
bill and
answer.

An answer is proved by producing the bill and answer (*g*), or by proof of examined copies (*h*); and the answer should be proved to be that of the party, by proof of his hand-writing, or by some acknowledgment by him. In civil cases (it is said) it will be presumed that the answer was upon oath (*i*); but since the answer in civil cases operates merely by way of admission, it is sufficient to prove it to be the answer of the party. The bill and answer may be proved by means of examined copies, although the answer be offered in evidence in a cause between different parties, and it is not necessary in civil cases to produce the original answer, and to prove it to have been signed by the defendant (*j*). If on proof of the copies, the names and characters of the parties correspond, that is sufficient *prima facie* proof of the identity of the parties, and the burthen of repelling the presumption lies on the objecting party (*k*); but it is otherwise in a criminal proceeding on an indict-

brought by *A.* against another underwriter, it was held that the latter was entitled to read the copy in evidence without reading *A.*'s answer. For whether it be or be not necessary to read an answer in Chancery for the purpose of making documents evidence which may be annexed to it, the rule would not apply to the case in question, for the letter was not before the Court of Chancery. And Lord Tenterden observed, "I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connexion with the case in which the documents are produced; but here, at least, we think the copy in question was admissible without the answer." *Long v. Champion*, 2 B. & Ad. 284. In an action against the sheriff for a false return of *nulla bona* to an execution issued against the goods of *E.*, the latter having filed a bill in Chancery, in which suit an order had been that all letters written by *E. inter alia*, should be brought into court; held, that although the defendant might give in evidence the order as an act of court not affecting the right of either parties, yet that the letters of *E.* were inadmissible without the bill and answer; it not being proposed to put in with them any letter written by the plaintiff in reply, the answer might explain or wholly neutralize the effect of such letters. *Hewitt v. Pigott*, 5 C. & P. 77.

(*g*) Bac. Ab. Ev. 623. The bill ought

to be produced, because it may be material to explain the answer.

(*h*) *Ewer v. Ambrose*, 4 B. & C. 25. *Hennel v. Lyon*, 1 B. & A. 182. *Ries v. Bowen*, 1 M'Cl. & Y. 383.

(*i*) Bac. Ab. Ev. 623. B. N. P. 238, 239. See *Crooke v. Dowling*, Doug. 77. *Jamer's Case*, 1 Show. 327.

(*j*) *Lady Dartmouth v. Roberts*, 16 East, 334. *Hodgkinson v. Willis*, 3 Camp. 401. *Ewer v. Ambrose*. *Highfield v. Penke*, 1 M. & M. 109; *supra*. *Studdy v. Saunders*, 2 D. & R. 147. *Rees v. Bowen*, 1 M'Cl. & Y. 383. In the case of *Dartnall v. Howard*, 1 R. & M. 169, it was held that for the purpose of identifying the original answer, of which an examined copy was produced, as the answer of the defendant, a witness who had seen the original was allowed to prove that it was in the handwriting of the defendant, though it was not produced. Although the bill be lost, the answer will still be evidence, as an admission under the defendant's hand. 1 Ford's MSS. 145.

(*k*) *Hennel v. Lyon*, 1 B. & A. 182. See 1 Lord Raym. 154; 2 Bl. 1190. Note, that the defendant in *Hennel v. Lyon* was *Charles Lyon*, sued as the administrator of *Mary Lyon*, and by his plea he had admitted himself to be such administrator, and the copy of the answer showed that the bill was filed against

ment for perjury, or an action for a malicious prosecution, which is in the nature of a criminal proceeding (*l*). Proof of bill and answer.

But it is sufficient to produce the examined copy of the answer of the witness in equity, in order to contradict his testimony, for it cannot be regarded as a criminal proceeding (*m*). On proof of search for the bill by the officer in the proper office, and that it cannot be found, the answer has been allowed in evidence without proof of the bill (*n*).

A man's voluntary affidavit is admissible against himself, and if offered as an affidavit, must be proved to have been sworn (*o*); but proof of the party's signature makes it admissible as a note or letter, without further proof (*p*). Where an affidavit has been made in the course of a cause, proof that such a cause was depending, and that such affidavit was used by the party, would be sufficient evidence to prove the affidavit in a civil suit (*q*). A copy of a voluntary affidavit is not admissible in evidence, for it has no relation to a court of justice (*r*). In order to prove an affidavit of the defendant in the same court in which the action is tried, it is sufficient to prove an examined copy, without proving the handwriting of the party, or that he was sworn (*s*). Affidavits.

Next as to pleadings in an action at law. Where there are several counts in the same declaration, or several distinct pleas, an allegation in one count or plea cannot be insisted upon by the adversary as an admission of a fact, for a purpose distinct from the proof of that count, or of the issue upon the plea; for every issue is to be distinctly tried. Thus upon a declaration in *assumpsit*, by a landlord against a tenant for breach of good husbandry, Pleadings in an action at law.

Charles Lyon as administrator of *Mary Lyon*. The Judges relied on the coincidence of description, and Lord Ellenborough seems to have considered it as a matter of public convenience to receive such evidence in civil cases without further proof. Identity may be evidenced where necessary by proof of the party's handwriting. See *R. v. Benson*, 2 Camp. 508. *R. v. Morris*, 2 Burr. 1189. See further, *Dartnell v. Howard*, Ry. & M. 160. *Scott v. Lewis*, 7 C. & P. 349. *Price's Case*, 1 Leach, 323. *Bendy's Case*, ib. 330; and tit. HANDWRITING—PERJURY.

(*l*) 16 East, 348. *R. v. Morris*, 1 B. & A. 182. *R. v. Benson*, 2 Camp. C. 508. See Vol. II. tit. PERJURY. The fact of swearing may be proved by evidence of the Master's handwriting to the *jurat*, without calling him. *R. v. Benson*, 2 Camp.

508. *R. v. Morris*, 2 Burr. 1189. The *jurat* is evidence of the place where the oath was taken. *R. v. Spencer*, 1 Ry. & M. 97; but not conclusive. *Emden's Case*, 9 East, 437.

(*m*) *Ever v. Ambrose*, 4 B. & C. 25.

(*n*) Gilb. Ev. 49.

(*o*) B. N. P. 238.

(*p*) *Ibid*.

(*q*) *Ibid*. and Show. 397; and perhaps in a criminal proceeding.

(*r*) B. N. P. 338. And therefore a copy of an affidavit made by the defendant in Chancery, of his being worth 2,500*l*., was rejected by Lord Raymond, when offered for the purpose of increasing the expenses; and the plaintiff was obliged to send for the original. *Chambers v. Robinson*, B. N. P. 238.

(*s*) *Cameron v. Lightfoot*, 2 Bl. R. 1190.

Pleadings
in an action
at law.

where there is one count which professes to be founded on a special written agreement, and a second upon an implied contract, the defendant cannot insist upon the first count as evidence that a written contract exists, so as to impose upon the plaintiff the necessity of producing it (*t*); and besides, every different count professes to be founded upon a distinct ground of action. So in trespass, a plea of justification does not supersede the necessity of proving the trespass, where the general issue is pleaded (*u*). A protestation is defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him on the other side, on which he cannot take issue (*x*). According to Lord Coke (*y*), it is an *exclusion* of a *conclusion* that a party may by pleading incur; it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him.

Protestations.

A protestation was of no use to the party who took it, unless either the issue was found for him (*z*), or unless the matter could not have been pleaded (*a*). Protestations are now excluded by the new rules, but a party is to have the same advantage as if a protestation had been made.

A demurrer to a plea in equity is not such an admission of the facts charged, as to be evidence of those facts against the party demurring, in a subsequent action between the same parties (*b*).

Mixed
documents.

Secondly, documents which are partly of a public and partly of a private nature, are court rolls, corporation books, and perhaps also within the same class may be included the books of some private companies. These, with respect to a particular class of society, may be considered as public documents, because they pro-

(*t*) By Le Blanc, J., Lancaster Sp. Ass. MSS. C. The plaintiff cannot use one plea of the defendant for the purpose of proving a fact which the defendant denies in another plea, nor can he use a notice of set-off as evidence of the debt on the issue of *non assumpsit*. *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 53. Vol. III. tit. PARTICULARS. *

(*u*) In trespass for throwing down and carrying away stalls, as to all the trespass but the throwing them down, the defendant pleaded not guilty; and as to the throwing them down, a special justification; and therein justified both the throwing down and carrying away; and on the issue joined, the Judge at the assizes would not try whether the defendants were guilty

or not of carrying away the stalls, because they had confessed that by their justification; and on motion for a new trial it was denied, because the jury could never find the defendants not guilty, contrary to their own confession upon the record, though in another issue. B. N. P. 208. Note, that in the margin it is observed, that this case was before the statute enabling the defendants to plead double.

(*x*) Plowd. 276, b. *Graysbrook v. Fox*, Finch, 359. 361; 2 Will. Saund. 103, a.

(*y*) Co. Litt. 124.

(*z*) Bro. Prot. 14; Co. Litt. 124; Plowd. 276, b.

(*a*) Ibid. and 2 Will. Saund. 103, a.

(*b*) *Tomkins v. Ashby*, 1 Mood. & Mal. C. 32.

ceed from an authority which it recognizes; but, with respect to the rest of the community, they may be nothing more than mere private documents, resulting from no acknowledged authority.

Court rolls and customaries of manors are evidence between the lord and the tenants, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the Manor Court, which was formerly a court of justice (c). Such documents, handed down from remote times, and kept in the muniments of the manor, are not, as far as regards the tenants of the manor, to be regarded as *res inter alios actæ*; they are documents to which all are privy. Custom is of the very essence of a copyhold tenure; and as reputation is evidence to prove a custom (d), so are those documents which contain the solemn adjudications or opinions of the homagers or tenants themselves, as to customary rights, or which have been handed down from one generation to another, and reputed to contain a true account of the manorial customs (e). Hence entries upon the court rolls are evidence to prove the mode of descent, although no instances of persons having taken according to that mode be proved (f); so they are to prove that proclamations have been made (g). A customary of a manor, which has been handed down from steward to steward with the court rolls, is evidence of the mode of descent within the manor, although not signed by any one (h).

The examined copy of a court roll (i) is admissible in evidence, upon the same principle as the chirograph of a fine or enrolment of

(c) Gil. L. Ev. 235; 4 T. R. 670. See tit. JUDGMENTS. Ancient presentments are not evidence for the lord, unless signed by a party in privity of estate with the person against whom they are produced. *Benett v. Coster*, Burrough, J., Wilts Summ. Ass. 1817. Presentments by homage, restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, not acted on, have no weight against an uniform contrary usage. *Arundell v. Lord Falmouth*, 2 M. & S. 440. Where the plaintiff claimed a right in the soil of land adjoining his farm, it being contended that he had only a commonable right, held that an ancient instrument in the nature of a presentment at the manor-court by the freeholders, finding that the then owner of the farm, and those claiming the right of the soil, had no separate right, but only a right thereon, as the other freeholders, for commonable cattle, was inadmissible in

evidence, either as a presentment, the homage having no right to decide upon a claim made by an individual to the freehold, or as an award, the party not appearing to have submitted himself, or as evidence of reputation, being *post litem motam*; and *semble* reputation could not affect a question of private right. *Richards v. Bassett*, 10 B. & C. 657.

(d) Vid. Vol. II. tit. CUSTOM.

(e) See Lord Kenyon's observations, *Roe v. Parker*, 5 T. R. 26; 2 M. & S. 92; and *Chapman v. Cowlan*, 13 East, 10. *Doe v. Mason*, 3 Wils. 63.

(f) 5 T. R. 26; 2 M. & S. 92.

(g) *Doe v. Hellier*, 3 T. R. 162.

(h) *Denn v. Spray*, 1 T. R. 466. See tit. COPYHOLD.

(i) *Doed. Bennington v. Hall*, 16 East, 208; 5 Esp. C. 221; Comb. 157. *R. v. Haines*, ib. 137. The originals are evidence, although unstamped. 16 East, 208; 4 B. & Ad. 617; B. N. P. 247.

Court rolls. a deed (*h*). So a copy of a court roll under the hand of the steward is good evidence to prove the copyholder's estate (*l*).

An examined copy of a particular entry in the court rolls of a manor, is evidence without producing the original, even where it may be presumed that the books themselves contain other entries connected with the point in issue (*m*).

A surrender of copyhold lands by deed out of court is evidenced by the copy, although the stat. 48 G. 3, c. 149, requires the deed and not the copy to be stamped (*n*). See further on this subject, Vol. II. tit. COPYHOLDS.

Corporation books.* The books of a corporation, containing a register of their public acts, are evidence as between the members of the body, or against the body, for they contain the rules and regulations to which they are all subject, and to which all are privy (*o*). But they are not evidence for the corporation against a stranger (*p*).

In the case of *Marriage v. Lawrence* (*q*), where in an action for

(*h*) Per Holroyd, J., in *Appleton v. Lord Braybrooke*, 6 M. & S. 38.

(*l*) B. N. P. 247; 16 East, 208.

(*m*) *Doe d. Churchwardens of Croydon v. Cook*, 5 Esp. C. 221. And see *Style*, 450. *R. v. Shelley*, 3 T. R. 141. *R. v. Allgood*, 7 T. R. 746. *R. v. Lucas*, 10 East, 235. *Bateman v. Phillips*, 4 Taunt. 162. Court rolls, containing licences to fish, granted in the 17th century at certain rents, are admissible to prove a prescriptive right to a several fishery, claimed as appurtenant to a manor, without showing the actual payment of those rents, where it appears that during the last century leases have been granted of the fishery, and that for the last forty years the rents under the leases have been regularly paid, or that other acts of ownership have been acquiesced in. *Rogers and others v. Allen*, 1 Camp. C. 109. As to the right of inspecting court rolls, see Vol. II. tit. INSPECTION. The right to inspect does not depend on the pendency of a suit. *R. v. Lucas*, 10 East, 235; but see *R. v. Allgood*, 7 T. R. 746, *contra*. An inspection will be granted on a *prima facie* title, 10 East, 235, as to ascertain a right (to cut timber, *c. gr.*) which the lord disputes. *R. v. Toicer*, 4 M. & S. 162. Where a lord of a manor is indicted for a

nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *R. v. Earl of Cadogan*, 5 B. & A. 902.

(*n*) *Doe v. Mee*, 4 B. & Ad. 617.

(*o*) See the case of *Thetford*, 12 Vin. Ab. 90, pl. 16; and *R. v. Mothersell*, Str. 93.

(*p*) *Mayor of London v. Lynn*, II. Bl. 214, in n. *Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102. Entries in corporation books in order to show that the curate had been appointed by the corporation, held inadmissible as evidence to establish their right against the vicar. *Attorney-general v. Warwick Corp.* 4 Russ. 222.

(*q*) 3 B. & A. 142. See the *Mayor of Kingston-upon-Hull v. Horner*, Cowp. 103, where, in an action by the corporation for tolls, entries from the corporation books of the particulars of the tolls receivable to the use of the mayor, &c. were read. Copies of an ancient schedule produced from the muniments of the corporation, delivered to the toll-collectors, and by which they collected, held admissible for the corporation, although it would have been

* For further details of the evidence respecting corporations, see Vol. II. tit. CORPORATIONS.

trespass the issue was upon the right of the corporation of Malden to take certain tolls, it was held that an entry from the books of the corporation, dated 18th H. 8, purporting to contain the proceedings of the corporation against the masters of two ships who had refused to pay tolls, the seizure of the ships, and the submission of the masters to the payment of a fine, and to have been signed by the corporation clerk, was inadmissible, because the entry was not of a public nature. But it was said that if the subject of the entry had been of a public nature, the case would have been different.

Corporation books.

A customary, found in a book amongst the records of a corporation, was held to be evidence against the corporation. But in general, unless papers relate to the proceedings of the corporation as a corporate body, they are not evidence; and therefore, a letter found in a corporation-chest, in which *A. B.* was described to be of another place, was held to be inadmissible on a question whether *A. B.*, at the time he did a corporate act, was an out-burgess or not (*r*).

Upon the same principle, the books of public companies, or copies of them, are evidence between those who are interested in them, as against each other, or against the company; as the books of the East India Company, in a cause between the parties having stock there (*s*). So the Bank books, or copies from them, are evidence to prove a transfer of stock in the public funds (*t*).

Books of public companies, &c.

To establish the book of a corporation in evidence, it should be shown to have been publicly kept as such, and that the entries were made by the proper officer (*u*). But an entry made by one

Proof of corporation books.

been otherwise if not shown to have been so delivered from the corporation, however accurately corresponding. *Brett v. Beales*, 1 Mood. & Mal. C. 417.

(*r*) *R. v. Gwyn*, Str. 401.

(*s*) *Geary v. Hoskins*, 7 Mod. 129. See 2 Str. 1005; 1 Wils. 240; 1 Bl. R. 40; 1 T. R. 689; Doug. 593; 3 Salk. 154.

(*t*) *Bretton v. Cope*, Peake's C. 30.

(*u*) *R. v. Mothersell*, Str. 92; 12 Vin. Ab. 90, pl. 16. The usual mode of procuring an inspection of corporation books is by rule, where an action is pending; by *mandamus* in other cases. A rule can only be granted where a cause is pending, and only then for a *limited* inspection. For an unlimited inspection, the course is by *mandamus*: *R. v. Babb*, 3 T. R. 579. *Lynn Corporation v. Denton*, 1 T. R. 689. *Barnstaple Corporation v. Lathey*, 3 T. R. 303.

See Vol. II. tit. INSPECTION. By the stat. 12 Geo. 3, c. 21, s. 2, freemen and burgesses of corporations are entitled to inspect the records of any city, corporation, borough or cinque port, and to take copies and extracts from them. By the stat. 32 Geo. 3, c. 58, s. 4, every mayor, &c. or other officer of any corporation having the custody of or power over the records, shall, upon the demand of any person, being a member of the corporation, permit such person (except on particular excepted days) to inspect the books and papers wherein the swearing in of the freemen, burgesses, or other members or officers of such corporation, shall be copied, and to have copies or minutes of the admission, or the entry of swearing in of any one or more of such freemen, burgesses or other members or officers, on paying 6d. for every 100 words, for writing

Corporation books,
proof of.

who acts for the officer *pro tempore*, as during the illness of the town-clerk, is evidence, if the fact be proved (x). On this ground, upon a *quo warranto*, it was held that minutes of the proceedings of a corporation, taken several years before by the prosecutor's clerk, and not kept as a public book, had been properly rejected at the trial (y).

The seal of a public corporate body need not be proved, as the seal of an individual, by means of a witness who saw the seal affixed, &c. to the instrument; it is sufficient to show that the seal is the official seal of the corporate body (z). As public seals are of a permanent nature, it seems that they are not within the principle of the rule which dispenses with the proof of private seals affixed to documents 30 years old (a). The documents must be proved to have come from the proper place of deposit. But in an action for a false return to a *mandamus* (b), it was held that a corporator was capable, as a depositary of the muniments, of being brought forward for the purpose of producing them, subject to cross-examination by the adversary, as to the custody of the document (c). And it seems that if the party objecting wish to inquire as to the custody, the corporator may be examined on the subject (d).

the same, under a penalty, in case of refusal, of 100*l.*, payable to the informant. If two are bailiffs, both are suable jointly, *Sheuldarn v. Bunnis*, Cowp. 192. The stat. does not oblige him to grant inspection of books containing the orders for, and memoranda of, admissions and swearing in. *Davis v. Humphreys*, 3 M. & S. 223. By the stat. 3 Geo. 3, c. 15, s. 4, candidates on elections of members to serve in Parliament for corporations, &c. and their agents, are entitled to inspect the books and papers of the corporation, &c. wherein the admissions of freemen shall be entered, and to have copies on payment, &c. This statute extends to all books, papers, &c. containing entries of admissions of freemen. *Sheuldarn v. Bunnis*, Cowp. 192. See Vol. II. tit. INSPECTION.

(x) *R. v. Mothersell*, Str. 92: 12 Vin. Ab. 90, pl. 16.

(y) Str. 92; 12 Vin. Ab. 90, pl. 16.

(z) *Moises v. Thornton*, 8 T. R. 307. *Chadwick v. Bunting*, Ry. & M. 306. It has been held that the seal of the city of London proves itself, by Lord Kenyon. *Woodmass v. Mason*, 1 Esp. C. 53. The production

of a sealed instrument purporting to be a diploma of a degree conferred by the University of St. Andrew's, and proof that a person calling himself the university librarian, had shewn in a room which he called the University Library a seal corresponding with the instrument produced, was held to be sufficient evidence. *Collins v. Carnegie*, 1 Ad. & Ell. 605.

(a) *R. v. Bathwicke*, 2 B. & Ad. 648. Where it was also held that the seal of a bishop to an ordination was not to be regarded as his corporate seal.

(b) *R. v. Netherthong*, 2 M. & S. 238.

(c) As to the means of procuring an inspection of such documents, see tit. INSPECTION.

(d) Per Lord Ellenborough, *R. v. Netherthong*, 2 M. & S. 337, citing a case in which Lord Kenyon had so acted in an action for a false return to a *mandamus*. In the principal case it was held that a certificate produced by a rated inhabitant overseer, by which the appellant parish admitted the settlement of the pauper in the latter parish, was admissible.

Private writings and entries may, with a view to their operation in evidence, be distinguished into those, First, to which the person against whom they are offered was party or privy. Secondly, Entries made by third persons (*e*). And they may be considered, first, with respect to their nature, admissibility and effect in evidence; and, secondly, with respect to the means of proof. Documents offered in evidence against one who was a party or privy to them, are either, 1st, under seal, or 2dly, not under seal. All documents to which a person was party (*f*) or privy are in general admissible in evidence against him, since they operate as acknowledgments or admissions on his part, or that of another through whom he claims, that the facts contained in them are true, particularly if the admission was against the interest of the party so making it (*g*). All written contracts are made for the express purpose of being afterwards used as evidence of the contract, the only difference between sealed and parol contracts in this respect being this, that the former are more solemnly authenticated, and not so easily revoked. So essential is it that the rights of men should be evidenced by documents of this nature, that the law itself requires, in many instances, the evidence of a deed to notify and establish the particular facts, and in many others renders a contract, or memorandum in writing, essential for the same purpose. Thus incorporeal rights, as to fairs, markets, and advowsons, cannot be transferred except by grant (*h*), and the provisions of the statute of frauds in many instances render a note or memorandum in writing necessary to the proof of the contract (*i*).

Private writings.

In general, an admission under seal is conclusive upon the obligor, and estops him from asserting or proving the contrary. Thus, if a condition in a bond recite that a particular suit is depending in the court of King's Bench, the obligor is estopped from saying that there is no such suit there (*k*). So if the condition of a bond be to perform the covenants in a particular indenture, he

Express admissions by a party.

(*e*) And the declarations made by third persons frequently stand upon the same foundation. In one instance, *Serle v. Lord Barrington*, Str. 826, *infra* 356, an entry was admitted as evidence for the party who made it.

(*f*) Letters written by a party are evidence against him without producing the answers to such letters. *Lord Barrymore, Administrator v. Taylor*, 1 Esp. C. 326. *Kenyon, C. J.* 1795. And see *Smith v. Young*, 1 Camp. 430. *Randle v. Blackburn*, 5 Taunt. 245.

(*g*) See Vol. II. tit. ADMISSIONS. Upon a question touching the right of presentation by the bishop, a case stated by a former bishop for counsel's opinion, and found among the family muniments of the latter's descendants, is admissible in evidence against the former. *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 193.

(*h*) See Gil. L. Ev. 88; Vol. II. tit. PRESCRIPTION.

(*i*) 29 Car. 2, c. 3.

(*k*) Cro. Eliz. 750; Com. Dig. Estoppel. A. 2.

Express
admissions
by a party.

is estopped from saying that there is no such indenture (*l*). So a grantor is estopped by his deed from saying that he had no interest in the thing granted (*m*). But a deed-poll does not estop a lessee or grantee, for it is the deed of the lessor or grantor only (*n*).

Estoppel to
be pleaded,
when.

In general, however, in order to conclude the party by his deed by way of estoppel, it should be pleaded, for if his adversary does not rely upon the estoppel, the Court and jury are not bound by it; but the jury may find the matter at large according to the fact, and the Court will give judgment accordingly. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel. Thus in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff, instead of relying on the estoppel, reply *habuit*, &c. he waives the estoppel, and leaves the matter at large, and the jury are to find the truth, notwithstanding the indenture (*o*).

But when an estoppel creates an interest in lands, the Court will adjudge accordingly upon the facts found by the jury. As if *A.* lease land to *B.* for six years, in which he has no interest, and then purchase a lease of the same lands for twenty-one years, and afterwards lease to *C.* for ten years, and these facts are found by verdict, the Court will adjudge the lease in *B.* to be good, though it was so only by the conclusion (*p*).

So in other cases, where the party who might have relied upon the estoppel, in pleading, waives it, and gives the deed in evidence, although the jury are not bound by the estoppel from finding

(*l*) 1 Rol. 872, l. 30. Com. Dig. Estoppel, A. 2. For other instances, see tit. AD-MISSIONS.

(*m*) 2 T. R. 171. But the principle does not apply where the grantor is a trustee for the public, and grants that which he was not authorized by the Act from which he derives his authority. Ibid.

(*n*) Co. Litt. 363, b. A lessee by indenture, in an action of covenant for ploughing up Laines Meadows, without paying at a certain sum per acre, was held not to be estopped from averring that Laines Meadows were not meadow ground, although they were described as meadows in the lease. *Shipwith v. Green*, Str. 610.

(*o*) P. C. Sulkeld, 277; Com. Dig. Es-

toppel, C.; Ibid. Pleader, S. 5. So in general, although the parties are estopped to say the truth, the jury are not. B. N. P. 298.

(*p*) Com. Dig. Estoppel, E. 10. See also Pol. 68. So if the plaintiff in ejectment make title by a judgment in a *scire facias*, on a judgment in Trinity term, where the judgment was in fact of Michaelmas term, the jury cannot find that the original judgment was of Michaelmas term. *Trevivan v. Lawrence*, Salk. 276. So if a woman sue or be sued as sole, and judgment be against her as such, though she was covert, the sheriff shall take advantage of the estoppel. 1 Rol. 869, l. 50; 1 Salk. 310; Com. Dig. Estoppel, B. D.

according to the truth of the fact, yet it seems they would not be warranted in finding a verdict contrary to the solemn admission of the party, without the strongest evidence of fraud. As for instance, in an action of *assumpsit*, where the defendant pleads the general issue, and gives in evidence a release which he might have relied upon as an estoppel; although he has waived the estoppel, still the release seems to be conclusive evidence for the defendant, in the absence of fraud. There are also numerous instances in which a party, by his admissions and representations, is concluded from showing the contrary in evidence, although the fact could not have been pleaded by way of estoppel. For instance, where a man has represented a woman to be his wife, in an action for necessities supplied to her, he would in general be concluded by that representation, which would operate as a kind of estoppel *in pais* (g).

Estoppel to be pleaded, when.

It is a general rule that all privies, whether in blood as the heir (r), in estate as the vendee (s), or in law as the lord by escheat (t), or one who claims under another by act of law, or in the post (u), tenant in dower, or by the courtesy (x), are bound by an estoppel.

Privies.

The effect of deeds and written contracts, not under seal, will be hereafter more fully considered under the several heads to which they belong, as bonds, covenants, agreements, bills of exchange, policies of insurance, &c. It may be observed here, that since in all these cases these documents have been framed by the parties themselves as the authentic evidence of the facts which they contain, and of their own intentions, no other evidence can in general be admitted to alter the obvious sense and meaning of the terms which they have used; to admit this would be to deprive them of all effect as permanent memorials for the purposes of evidence, for they could no longer be so considered if their meaning could be altered and subverted by extrinsic and collateral evidence. Since this is a fundamental rule, applicable to written evidence in general, its nature and application will be more fully discussed hereafter (y).

The sense of contracts not to be altered by parol evidence.

Secondly, Entries and declarations made by third persons (for the latter stand upon the same footing with the former) are not

Entries by third persons.

(g) See Vol. II. tit. ADMISSION.

(r) Co. Litt. 352, a.; Pol. 61. 66. Com.

Dig. Estoppel, B. 3 T. R. 365.

(s) 1 Salk. 276.

(t) Co. Litt. 352, a.

(u) Co. Litt. 352, b.

(x) Pol. 61; Co. Litt. 352.

(y) See tit. PAROL EVIDENCE.

Entries by
third per-
sons.

in ordinary cases admissible; they usually fall within the description of *res inter alios acta* (z).

Whether the declaration by a third person be oral or written, the general objection applies, that it was not made under the sanction of an oath, and that the party against whom it is offered had no opportunity to cross-examine. Such a declaration or entry is therefore, on principles already adverted to, inadmissible, unless its admissibility be warranted by some special rule of law applicable to the particular circumstances (a).

Entry by
third per-
son, admis-
sible when.

The entry or declaration of a mere third person may be admissible as original evidence, where it *accompanies* and is *explanatory* of the nature and quality of a material fact, or as secondary evidence, where it is admissible on a principle of necessity, warranted by particular circumstances, which afford a reasonable assurance that the party whose testimony is no longer attainable *knew* the fact, and *communicated* it faithfully.

The considerations which warrant the reception of such evidence are principally these:

That the entry or declaration should have been made in the course of office duty or business, and that it was against the interest of the party to make it.

It seems to be clear that such an entry, when made in the ordinary course of profession or business, and when it might

(z) See above tit. *RES INTER ALIOS*, &c. As to those which operate by way of admission, see Vol. II. tit. *ADMISSION*.

(a) In *trover* for taking goods by defendant under colour of distress, the question being whether the defendant or *J.B.* was the plaintiff's landlord, the latter having been shown by the plaintiff to have been the party to whom he and his father had always paid the rent; held, that the defendant, in order to show that he received it merely as agent, could not give in evidence accounts rendered by that party in which he described himself as agent, as the party being alive might have been called, and that they were therefore properly rejected. *Spurgo v. Brown*, 9 B. & C. 935. In *assumpsit* for two-fifths of a loss recovered by the defendants as agents for *S.*, an invoice sent by *S.* to the defendants, to enable them to recover from the underwriters, was held to be evidence of the plaintiff's interest.

Mendham and another v. Thompson and another, 1 Stark. 316; *Ellenborough, C.J.* 1816. But an invoice made out by *S.* and not shown to have been so sent, was rejected as merely *S.*'s declaration. In an action against underwriters, the bill of lading, signed by the captain, is not evidence of the shipment of the goods. *Dickson v. Lodge*, 1 Starkie's C. 226. A banker's ledger is admissible to show that a customer had no funds in the banker's hands. *Furness v. Cope*, 5 Bing. 114. *Semble*, more properly to show that no entry was made in that ledger.—Note, that one of the clerks stated that it was the book to which all the clerks referred to see whether they should pay the cheques presented to the house; and *Best, C.J.* held that it was admissible in order to obviate the necessity for calling a multitude of checks, and that it was evidence merely to negative the fact of the trader having money in the house.

operate against the interest of the party making it, is sufficient to warrant the admission of the evidence.

Entry by
third per-
son, admis-
sible when.

And it seems that some connexion between the entry with some fact to which it relates, such as the possession of land, or with the performance of some ordinary duty or course of business, is essential to its admissibility; but whether that alone would be sufficient, or whether it is also essential that the entry should be such as might operate against the interest of the party making it, is not clearly settled.

It may however be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party; and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable extent.

It may further be remarked, that the mere circumstance of an entry having been made which might operate against the interest of the party making it, would not in itself, and independent of some support from its connection with the exercise of some duty, or with the ordinary course of dealing, be sufficient to warrant the admission of the entry in evidence. Suppose, for instance, that a party were to make an entry in his pocket-book that he had laid a wager with another as to the existence of some fact, and that he had lost the wager, the entry would be to a certain extent against his interest, for it might by possibility be used as evidence against him; yet it seems to be clear that the entry would not be evidence as to the fact against a stranger. The above remarks are supported by the case of *Doe v. Turford* (b). It was proved to be the usual course in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service. On one occasion the attorney himself prepared a notice to quit to serve on a tenant, and took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of having delivered it to the tenant, and two of them were proved to have been delivered; after his death the indorsement is evidence of the service of such notice. For (per Lord Tenterden) the indorsement having

(b) 3 B. & Ad. 800.

Entry by
third per-
son, admis-
sible when.

been made in the discharge of his duty, was, according to the authorities, admissible evidence of the fact of service. Parke, J. held that it was admissible evidence, not on the ground that it was an entry against the interest of the party, but because, being an entry made at the time of his return from his journey, it was one of a chain of facts from which the delivery of the notice might be inferred. Taunton, J. because it was made at the time of the recorded fact in the ordinary course of business, and the fact was corroborated by circumstances.

Lord Ellenborough, in the case of *Doe v. Robson* (c), in giving judgment as to the admissibility of entries of charges made by an attorney in his books, lays no stress on the fact that it appeared that such charges had been paid; he says expressly, "the ground upon which their evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." And in the case of *Higham v. Ridgway* (d), Le Blanc, J. observed, "I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person; it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence."

Lord Eldon, in the case of *Barker v. Ray*, observes, "the cases satisfy me that evidence is admissible of declarations made by persons who have a complete knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was, as to the position that you are to receive evidence of declarations where there is *no interest*. At a certain period of my professional life, I should have said that the doctrine was quite new to me; I do not mean to say more than that I still doubt concerning it."

It is observable, that the great object of the rule is, to guard not against *fraud*, but negligence and carelessness; the slightest suspicion of fraud would be sufficient at once to exclude such evidence; and the imposing the limitation, that the entry, to be admissible, should be apparently against the interest of the party making it, would afford no security against fraud; the forger of a false entry would take care to obviate any objection of this description, by admitting payment or some other fact apparently against the interest of the supposed author of the document. The consideration

that the entry is against the interest of the party is therefore principally material, as it affords reason for supposing that a person would not be likely to commit any error or mistake which might afterwards turn to his prejudice. When, however, it is considered that in many instances such entries remain in the private custody of the parties who make them, it is not probable that the consideration that the document might be published by accident or mistake, and might, in some possible state of circumstances, be turned to the prejudice of the party, would cause him to exercise a degree of exactness and caution, so far beyond that which he would have used in the common course of professional or official duty, or ordinary habits of business, as to supply a sound and useful test, operating to the admission of the former, the rejection of the latter. In the absence of all suspicion of any motive to the contrary, it is fairly presumable that all entries made in the ordinary routine of business are truly made: the same motive which induced a party to use the pains and trouble of making an entry at all, would usually induce him to make a true entry; a false one would be of no value, and the making it would frequently be more troublesome than to make a true one; it would require the additional trouble of invention; and although the sparing of trouble might, in many instances, induce a party to state particulars without sufficient accuracy, it would seldom cause him to invent and state a transaction which never happened.

Admissible,
when.

Whatever weight therefore be due to the consideration, that in a particular case the entry of a fact contained an admission by the party making it, which, if untrue, was against his interest; it may be doubted whether that circumstance be of so strong and decisive a nature as to afford a sufficient test for the admission of such entries, and the rejection of all others which do not contain an admission against the interest of the maker. Upon a question like this, the rule of law, unless some collateral inconvenience would follow, ought to depend on the intrinsic weight of the evidence admitted or excluded; and it would be advisable, for the sake of adherence to principle, as well as on grounds of convenience, to avoid an arbitrary rule, founded on a casual circumstance, which affects at most the weight of the evidence, not its value or quality; and which would, in many instances, operate to exclude the stronger and admit the weaker evidence.

Let it, by way of illustration, be supposed, that an attorney has in the same book two accounts, in one of which are contained the items in detail relating to the marriage settlement of *A.*, in the other a similar detail relating to the marriage settlement of *B.*;

Entries by
third persons, ad-
missible
when.

that the first appears to have been paid, the other does not; it may be asked, is any man's mind so constituted, that whilst he believed the former entries to be all true, he could withhold his belief as to the latter: could any one, in the absence of all suspicion of fraud, believe that a professional man would mis-spend his time by inventing a string of falsities, asserting that he took such and such instructions, and prepared this or that conveyance, without aim or object? If any one could conceive to himself, in the absence of any evidence to justify such a supposition, that the latter account was invented for some sinister purpose or other, would it not occur, that the admission of payment, tacked to the other, could not repel a similar suspicion as to its truth? What warrant could the admission of payment afford to obviate such a suspicion? How could the party be prejudiced by admitting that he was paid for business never done? On the same ground, therefore, that credit was given to the former, viz. the improbability of invention for some unknown sinister purpose, some, if not the same, degree of credit would also be given to the other.

A presumption arises from the usual course of affairs, that an entry made by a professional man was made at the time, or nearly so, of the date; such an entry is certainly not to be considered as equal in force to direct evidence of the fact, the tests of an oath and of cross-examination being wanting; but it is impossible to say that it is not evidence which in itself affords a reasonable presumption as to the truth of the fact to which it relates, because it would be contrary to the usual course of human affairs, and to the experience of mankind, that a person who must have known whether the fact which he recorded was true or false, should have wittingly, and long before the importance of such a document could have been foreseen, and therefore without any conceivable motive, have stated that which was false rather than that which was true. If, indeed, such evidence could not be admitted without breaking down a strong and necessary bulwark for the protection of truth, and letting in hearsay evidence in general, it might be worth while to sacrifice such evidence to principles of general policy; this however would not be the consequence, since the limitation of such evidence to entries made by a person possessing peculiar means of knowledge, and unaffected by any temptation to deceive, in the usual course of his business or profession, would be, as it seems, sufficiently definite to distinguish those entries from the mere unauthorized entries or declarations of strangers.

In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence

in all cases where a question arises as to the nature and quality of that act. Thus where the question is, whether a promissory note was originally void for usury, letters written by the payee to the maker, and which are contemporaneous with the note, are admissible to prove that the consideration was usurious (e).

Entry or declaration accompanying an act.

Such evidence is also admissible on the same principle, to show the intention with which an act was done, where the intention is material (f). Thus, on questions of bankruptcy, declarations made by a trader, contemporaneous with the fact of absentsing himself from his place of residence or business, are constantly admitted in proof of the real nature and quality of the act (g).

Entries, &c. connected with acts.

In the case of *Aveson v. Lord Kinnaird* (h), on an insurance effected on the life of the wife, the question was whether she was in an insurable state at the time ; and declarations by her, as to the state of her health, made a few days after the certificate of her health had been obtained, as to the state of her health at the time when the certificate was obtained, and down to the time of the conversation, were held to be admissible in evidence, both to show her own opinion as to the state of her health, as well as with a view to contradict the evidence of the surgeon who had been called as a witness for the plaintiff. In an action of trespass, what the wife said immediately on receiving the injury, and before she had time

(e) *Kent v. Lowen*, 1 Camp. 177. *Walsh v. Stockdale*, Vol. II. 181. A letter inclosing a promissory note, may be read as evidence, by the writer, to show the purpose for which the note was sent. *Bruce and others v. Hurley*, 1 Starkie's C. 23.

(f) *Supra*, 61, 62 ; Vol. II. tit. INTENTION—MALICE.

(g) *Supra*, 35, 36,*62, 63 ; Vol. II. tit. BANKRUPTCY. When an act has been done to which it is necessary to ascribe a motive, what the person has said at the time is admissible, for the purpose of explaining the act. *Bateman v. Bailey*, 5 T. R. 512. Statements made by the bankrupt showing his knowledge and opinion of the state of his affairs at the time of the acts in question, held to be receivable although not accompanying any other act done ; so letters received by him in answer to applications for advances are evidence to show the refusal to render him such assistance, but not as to any facts stated in them. *Vacher v. Cocks*, 1 Mood. & M. C. 353. A trader in embarrassed circumstances made an assignment of all effects, &c. for the benefit of creditors:

in an action after her death, treating him as executor *de son tort*, a list of creditors made out by friend of trader under her direction about the time of the execution of the assignment, was held to be evidence to shew that the assignment was *bonâ fide*. *Lewis v. Rogers*, 1 C. M. & R. 48.

(h) 6 East, 293. Where the plaintiff had received in the lifetime of the owner certain notes as an alleged gift, and after the death of the party, the defendant having inquired as to what property of the deceased the plaintiff was possessed, she voluntarily produced the notes, stating at the time how she had received them, and the defendant had refused to deliver them back ; held that her account, as part of the *res gesta*, was admissible to go to the jury as to the way she became possessed, which with other circumstances might induce the jury to believe it correct or not. *Hayship v. Gymer*, 1 Ad. & Ell. 162 ; and 3 N. & M. 479. The declaration of the defendant's wife in delivering money to a witness to be paid over to the plaintiff in payment for sheep, is evidence in an action

Entries,
&c. con-
nected with
acts.

to devise anything for her own advantage, is also evidence (i). So is the complaint made by a person in case of rape, or an attempt to commit a rape, immediately after the injury (k).

To this head also the admissibility of declarations by tenants has sometimes been referred, and it seems that such declarations are clearly referable to this principle in all cases where the nature and quality of an act of ownership or dominion, or of the possession, is questioned and requires explanation, or when the nature and quality of the possession are questioned, and the contemporary declaration of the party doing the act or of the party in possession serves to elucidate and explain the nature and quality of such act or possession.

The application of the general principle already announced stands thus: In the absence of direct documentary proof of the title to lands, or to an easement or right arising out of lands, acts of possession and enjoyment must be resorted to as indirect evidence of the right (l). Where such possession and enjoyment have been of long continuance, the law in many instances makes that possession and enjoyment conclusive as to the right, and in all cases renders such evidence admissible, on the reasonable presumption that unless those acts and possession had been founded in right, they would have been resisted by him whose right was violated. But the admission of such acts of possession and enjoyment in evidence, frequently introduces a question as to their nature and quality, for on this must depend the question, whether they furnish any inference of acquiescence in an adverse enjoyment. This again must be decided by the mode and circumstances of enjoyment, and for this purpose the contemporary declarations of the parties concerned are necessary and essential evidence. If, for instance, the question be whether A. has a right of way to his house over the

for the price. *Walters v. Lewis*, 7 C. & P. 344.

(i) *Thompson and his Wife v. Trevanion*, Skinn. 402.

(k) *Brazier's Case*, 1 East, P. C. 444. *R. v. Clarke*, 2 Starkie's C. 243. *Trelawny v. Colman*, *ibid.* 191. In an action for libel of plaintiff, as surgeon of a poor-law union, for neglecting patients, held that the entries which the plaintiff was required to make by sect. 16 of the Act could not be read as evidence on an issue whether the plaintiff neglected those patients. *Meyrick v. Wakley*, 8 C. & P. 283; and 3 N. & P. 284.

(l) Acts of ownership can only prove that

which would be better proved by title-deeds or possession. Acts of ownership, where submitted to, are analogous to admissions or declarations, by the party submitting to them, that the party exercising them has a right to do so, and that he is therefore the owner of the property upon which they are exercised. Per Best, J. in *Hollis v. Goldfinch*, 1 B. & C. 220. On an indictment for shooting at the prosecutor, Patteson, J. held that evidence was admissible to show that prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. *Rex v. Riddale*, York Spring Assizes, 1887.

close of *B.*, and evidence be given that on a particular occasion the occupier of *A.*'s house used the close as a way, the whole force and efficacy of the evidence may depend on what was said at the time. If, on the one hand, it were proved that at that time the occupier of *A.*'s house asked the permission of the owner or occupier of the close to use the way, the fact, instead of affording evidence of an adverse right, would be strong to negative the right; if, on the other hand, the right to use was asserted and acquiesced in, the fact would afford evidence of acquiescence on the one hand, and of right on the other. The case of *Doe d. Human v. Pettit* (*m*) may be cited in illustration of these remarks.

Entries,
&c. con-
nected
with acts.

Human was the purchaser of lands; after his death, which was 30 years ago, his widow continued in possession for more than 20 years, and died; the question between the heir-at-law of the husband and the heir-at-law of the wife was, whether the possession by the wife was an adverse possession; and it was held, that her declarations during her possession that she held for her life only, and that after her death the premises would go to her husband's heir-at-law, were admissible to rebut the statute of limitations. They were not used to show the quantum of her estate, but only to explain the nature of her possession.

Upon similar grounds, title-deeds and testaments are admissible evidence of the rights of property (*n*). Title-deeds.

(*m*) 5 B. & A. 223. And see *Carne v. Nicholl*, 1 Bing. N. C. 430. In the case of *Doe v. Rickarby*, 5 Esp. C. 4, which was an action of ejectment on an alleged forfeiture of a lease for breach of a covenant not to injure or underlet, by *underletting*; it appeared, that after the house had been for some time empty, Mrs. Luthman was found in possession; and it was held, that the plaintiff was at liberty to prove that a witness on his behalf had inquired of Mrs. Luthman in what way she occupied it, and to give her answer in evidence. This case, however, goes to a great length: it is difficult to say that such an answer can be admissible as original evidence during the life of the declarant, except on the ground that she was the agent of the party to be affected, or that the declaration was evidence, as accompanying the fact of possession. But there was no sufficient proof of agency to let in such declaration, and the declaration was not admitted as explanatory evidence of a contemporaneous act, but rather to prove a

by-gone fact, the nature and terms of the original entry. In some instances, the admissibility of declarations by former occupiers, on the ground that they were against the interest of the declarants at the time, have been carried to a great length. See *Walker v. Bradstock*, 1 Esp. C. 458. Upon the trial of an indictment for obstructing a highway, the question was, whether the road was public or private; and it was held, that the declaration of a deceased occupier at the time of planting an alleged boundary willow, was inadmissible, either as a declaration accompanying an act, or as contrary to the party's interest, or as evidence of reputation. *Reg. v. Bliss*, 2 N. & P. 404. And see *Tickle v. Brown*, 4 Ad. & Ell. 378.

(*n*) *Supra*, p. 67, 68. 181; and see the cases there cited. A counterpart of a feoffment by a corporation, produced from their muniments, without proof of rent ever having been received in respect of the property, is inadmissible. *Lancum v. Lovell*, 6 C. & P. 437; 9 Bing. 405. The defendant justified

Title-deeds. Even modern deeds are also evidence to show the title of a party to a particular estate, when a sufficient ground has been laid by proof of the ownership of the party from whom the title is derived. Thus it is every day's practice to prove the title of *A. B.* to an estate, by proof of the execution of a conveyance by *C. D.* a former owner in possession of the estate. In such cases the evidence does not come within the objection of "*res inter alios*;" the deeds are nothing more than solemn declarations and admissions of the parties, accompanying and evidencing the nature of the act of transfer, and do not affect or conclude the rights of any stranger, any more than the mere fact of delivering the possession would conclude him. It is evidence of the same nature, as if a plaintiff in trover were to prove his ownership of a horse, or other chattel, by showing that he bought him for a particular sum at a fair. Such evidence, as a mere fact, and part of the *res gesta*, is admissible against all the world; it operates to the conclusion of no one without his assent, but merely so far as in its own nature it affects the transaction itself. For its force and effect, the evidence depends entirely upon its connexion with the acts of ownership and possession; proof of the execution of deeds by parties wholly unconnected with the estate would avail nothing to prove a title.

Surveys and maps.

Maps and surveys of estates are also evidence to show the extent of a man's estate, when it appears that they have been made with the privity and consent of the owners of the adjoining lands. *A.* being seised of the manors *B.* and *C.*, during his seisin caused a survey to be taken of *B.*, which was afterwards conveyed to *E.*; and upon a dispute between the lords of *B.* and *C.*, it was held that the survey was admissible in evidence (*o*).

But it is clear that no entry or survey taken by an owner would be evidence either for himself, or for one who claimed through him, against a party who did not claim in privity, since it might encourage persons to include in surveys more than belonged to them (*p*); and therefore, survey-books of a manor, although ancient, unless signed by the tenants, or unless they appear to have been made at a court of survey, are not evidence; they are mere private memorials (*q*).

breaking floodgates, as lessee of the Bishop of *W.*, old leases were produced from the registry, and admitted. *Wakeman v. West*, 7 C. & P. 479.

(*o*) *Bridgman v. Jennings*, 1 Lord Raym. 734. The only case, it is said, where a map is receivable in evidence, is where at the time it was made the whole property belonged to the person from whom both parties claim. *Doe v. Lakin*, 7 C. & P. 481. In

an action for breaking down floodgates, a map of the owner's and of adjoining lands is not admissible to show the course of the stream to the plaintiff's mill. *Wakeman v. West*, 7 C. & P. 479.

(*p*) Str. 95. 1 Lord Raym. 734. *Outram v. Morewood*, 5 T. R. 123.

(*q*) 12 Vin. Ab. 90, pl. 12; per Bacon. Exon Summ. 1719.

So it has been said, that an old map of lands has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase (r). It does not clearly appear under what circumstances this old map was held to be evidence, but it seems that one ingredient essential to its admissibility was its agreement with boundaries as adjusted in an ancient purchase, that is with some other instrument; and the term *adjusted* seems to imply some privity on the part of the owners of adjoining property, if the vendor was not himself the owner. A map annexed to a deed seems to stand on the same footing as the description contained in the deed itself.

Ancient
deeds,
maps, &c.

It is an established principle of evidence, that if a party who has peculiar knowledge of the fact, by his written entry, or even declaration concerning it, charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible evidence of the fact after the death (s) of the party (t).

Entries
made
against the
interest of
the party.

Where *A.*, a tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from his confidential agent, containing an account of the tenants and rents, on which the tenant for life indorsed the words, "a particular of my estate," and handed it down to *B.*, the succeeding tenant for life, who had a like limited power of leasing, by whom it was preserved, and handed down, amongst the muniments of the estate, to the first tenant in tail, it was held, that the document was evidence for the first tenant in tail against the lessee of *B.*, in order to show that the rent reserved by *B.*, the tenant for life, was less than the ancient rent which was reserved at the time to which the paper referred, the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way; viz. to diminish the rent, in order to increase his fine upon a renewal under the power (u).

(r) Gil. Ev. 78.

(s) Where entries were made against the interest of a party who had quitted the kingdom, there being charges of a criminal nature against him, but was still living, it was held, that it was not sufficient to entitle his declarations to be read. *Stephen v. Guennap*, 2 M. & M. 128. *Smith v. Whittingham*, 6 C. & P. 78. *Spargo v. Brown*, 9 B. & C. 935.

(t) *Higham v. Ridgway*, 10 East, 35; *infra*, 362. It has been said that an additional circumstance is necessary, viz. that the party who made the entry might have

been examined as to it, had he been living. Per Bayley, J., in *Higham v. Ridgway*. It is however observable, that in that case three of the Judges lay down the rule without this qualification; and in the case of *Short v. Lee*, 2 Jac. & Walker, 480, the Master of the Rolls held, that an entry by a deceased person was admissible, although he could not, in his life-time, have been examined to the fact. See also *Gleadow v. Atkin*, 1 C. & M. 424.

(u) *Roe dem. Brune v. Rawlings*, 7 East, 279.

Entries by
persons,
since de-
ceased,
against
their in-
terest.

In the case of *Searle v. Lord Barrington* (x), the Court is said to have extended this principle so far as to hold, that in an action upon a bond, a receipt for interest indorsed upon it by the obligee himself, is evidence to go to a jury to rebut the presumption of payment arising from lapse of time. If this case is to be taken as an authority for the general position, that an indorsement of the receipt of interest on a bond bearing date within the space of twenty years from the date of the bond, shall in itself, and without any proof that it was actually made within that space of time, or with the privity of the obligor, be evidence to rebut the presumption of payment, it seems to be difficult to support it upon principle; for it amounts to this, that in this particular case the party shall have an opportunity of making evidence in his own closet, in order to rebut a presumption which would otherwise arise against him. If this be so, the case must be regarded as anomalous, and as an exception to the plain fundamental rule, that a man shall not be permitted to make evidence for himself (y). If, on the other hand, this further limitation is to be applied to the reception of such evidence, that reasonable proof shall be adduced to show that the

(x) Str. 826. The bond was dated June 24, 1697; the indorsement of interest on the bond, under the hand of the obligee, was dated in 1707, being three years before the death of the obligor; and the cause was first tried Trin. 1724. Pratt, C. J. was of opinion that this indorsement was not evidence; but the three other Judges were of opinion that it ought to have been left to the jury, for they might have reason to believe that it was done with the privity of the obligor; because it was the constant practice for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt. Upon a second trial, Lord Raymond, C. J. admitted the evidence, and a bill of exceptions was tendered, and after judgment in the King's Bench for the plaintiff, a writ of error was brought in the Exchequer Chamber; and upon argument, five of the Judges were of opinion to affirm, and two to reverse, the judgment. The judgment was afterwards affirmed in the House of Lords. In *Barnes v. Ranson*, 1 Barnard, 432, a similar indorsement seems to have been admitted, though made after the presumption of payment had taken place. See Mr.

Nolan's note to the former case, in his ed. of *Strange*, 826. In a copy of select cases of evidence, there referred to, it is stated, that at the sittings after Michaelmas term at Westminster, 6 Geo. 3, Lord Camden said that he was never much pleased with the determination of *Searle v. Lord Barrington*; however, he said, it was law. See Vol. II. tit. BOND. In *Gleadow v. Atkin*, 1 Cr. & M. 428, an action on a bond, there was proof of payment of interest to a third person, and to connect that with the bond an indorsement on the bond by the obligee, stating that the bond was for trust money for that third person, of even date with the bond, was held to be admissible. An indorsement of the receipt of interest on a promissory note made by the payee, since deceased, is admissible to repel Statute of Limitations. *Gale v. Capern*, 1 Ad. & Ell. 102. See the st. 9 Geo. 4, c. 14, s. 3, Vol. II. tit. LIMITATIONS.

(y) See Lord Hardwicke's observations in the case of *Glyn v. the Bank of England*, 2 Ves. 43, and Lord Kenyon's, 5 T. R. 123; and Lord Ellenborough's in *Rose v. Bryant*, Camp. 323.

indorsement existed before the presumption of satisfaction had arisen, the doctrine seems to be more consonant with the principle above stated; a presumption arises that the obligee would not falsely and wantonly make an indorsement prejudicial to his own interest at the time (z), from which he could derive no benefit.

Entries by persons, since deceased, against their interest.

It seems to be clear, at all events, that such evidence would be inadmissible, if the indorsement appeared to have been made after the presumption had arisen (a).

Where the question was as to the property in a horse seized by the defendant under a heriot custom, a declaration by A. B., a third person, that he had given up his farm and all his stock to the plaintiff, was held to be admissible for the plaintiff for the purpose of proving that the horse belonged to the plaintiff before the death of A. B. (b).

Entries by which receivers, stewards, bailiffs, and other agents, charge themselves with the receipt of money, are in general admissible in evidence to prove the fact after they are dead, for (as it is said) it is reasonably to be presumed that a man would not wantonly charge himself with any responsibility (c); and evidence to show that the party making the entry had knowledge of the fact is unnecessary (d).

Entries by receivers, stewards, &c. charging themselves.

(z) In the case of *Glyn v. the Bank of England*, 2 Ves. 42, Lord Hardwicke said (of this case) he took it that the indorsements were made and bore date within twenty years. And in *Turner v. Crisp* (2 Str. 827), it was said, the indorsement appeared to have been made before it could be thought necessary to make evidence to encounter the presumption. It does not appear, however, from the report that any such evidence was given.

(a) *Turner v. Crisp*, Str. 827. 2 Ves. 43. Lord Raym. 1370.

(b) *Ivatt v. Finch*, 1 Taunt. 141. The evidence was rejected at the trial; but the Court of C. P. on a motion for a new trial, held that the evidence ought to have been admitted. Note, that in this case the defendant claimed through A. B., upon whose death he became entitled to a particular portion of his personal property as a heriot.—A. had taken the goods of B. in execution, and the sheriff having executed a bill of sale to him, B. was permitted to remain in possession, and the sheriff afterwards took the same goods in execution at

the suit of another creditor of B.; in an action by A. against the sheriff for the goods, it was held, that the declarations of B. as to the property of the goods, and that A.'s execution was merely colourable, were admissible for the sheriff. *Wilkes v. Farley*, 3 C. & P. 395. See *Gully v. Bishop of Exeter*, 5 Bing. 171.

(c) In an action by the lord for copyhold fines, the book kept by the steward of all fines assessed, whether paid or not, was offered in evidence to prove the payment of fines by remainder-men, as it was accessible to all the copyholders, and had been received by the steward from his predecessor; but it appeared that the steward made up a second book at the end of each year, in which he entered all fines which had been paid; and it was held that the evidence was inadmissible. *Ely, Dean, &c. v. Caldecott*, 7 Bing. 433.

(d) *Crease v. Barrett*, 1 C. & M. 925. Where it is said that the absence of such knowledge goes to the weight not the admissibility of the entry.

By persons
since de-
ceased,
against
their inte-
rest.

Accordingly it has been held (e), that an entry in the parish books, made by the officers of one township, of the receipt of a proportion of the church-rates from the officers of another township, was evidence to charge the latter with the payment of the same sums in future; and that the title at the head of the page, stating the customary proportion to be so paid, was also evidence.

In an action of trespass, entries by the steward of a former owner of the *locus in quo*, in his day book, of sums received from different persons in satisfaction of trespasses, are evidence; and it was held, that whatever would have charged the steward would be admissible evidence (f). A private book kept by a deceased collector of taxes, containing entries by him, acknowledging the receipt of sums in his character of collector, was also held to be admissible evidence in an action against his surety, although the parties who had paid them were alive, and might have been called (g).

So old rentals, by which bailiffs have acknowledged the receipt of monies, are evidence of the payment of such rents, and of the right to receive them if the bailiff or receiver be dead (h). But although the account of a bailiff or steward, who by marking particular items of receipt appears to have collected them, be evidence, it must appear from the subscription of his name, or otherwise, that it was part of the account of the steward or bailiff; for, in the absence of such evidence, it may be nothing more than a leaf drawn out of a book by the lord of the manor himself (i).

(e) *Stead v. Heaton*, 4 T. R. 609. 2 Ves. 42. Lill. Pr. R. 552. Banb. 184. *Outram v. Morewood*, 5 T. R. 121. 3 Wood 332. Old rates made by the parish officers of B. on the occupiers of land as parcel of B., and an account containing an overseer's account, in which against the sum for which the occupier had been assessed crosses were made, were held to be evidence that the sum assessed had been paid by the occupiers. *Plaxton v. Dare*, 10 B. & C. 17.

(f) *Barry v. Bebbington*, 5 T. R. 514.

(g) *Middleton v. Milton*, 10 B. & C. 317. See also *Doe v. Cartwright*, R. & M. 62; and App. 358. In the case of *Whitnash v. George*, 8 B. & C. 556, it was held that entries made by a clerk to bankers, in books kept by him in his capacity as clerk, were admissible in evidence after his death, in an action by the bankers against his surety, on a bond conditioned for the faithful discharge of his

duty as such clerk. And it was held that such entries were admissible, *not altogether* (according to Lord Tenterden) as declarations made by him against his interest, but because the entries were made by him in those very books which it was his duty as such clerk to keep: and per Bayley, J. the case of *Goss v. Watlington*, 3 B. & P. 132, was decided on the same principle.

(h) *Manning v. Lechmere*, 1 Atk. 458. Entries in a deceased agent's accounts, charging him with receipts, although not in his handwriting, but signed by him, are admissible. *Doe v. Stacey*, 6 C. & P. 130.

(i) *Franks v. Cary*, 1 Atk. 140. A book in the handwriting of A. B., purporting to contain accounts of tithes collected by him 70 years ago, cannot be read in evidence without proof that A. B. was collector of tithes at the time. *Short v. Lee*, 2 Jac. & W. 464. The statutes of an ecclesiastical corporation aggregate

Upon a question, whether certain ancient rentals, preserved in the archives of the dean and chapter of Exeter, were entries made by their receivers, charging themselves with the receipt of rents, it was held, that the books of modern receivers were not evidence for the purpose of laying a foundation by comparison, and of showing that the ancient books kept in the same manner, and containing similar entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such (*k*). But if from the inspection of such ancient books, and the language of the entries, it appear probable that they were in fact receivers' books, it seems that they are admissible in evidence (*l*).

By persons since deceased, against their interest.

A book of accounts, kept by an executor and trustee of an estate directed to collect and apply the rents for the benefit of the *cestui que trust*, is admissible as charging himself, to prove seisin in a writ of right (*m*).

So the book of a bursar of a college is said to be evidence as to money paid by him or received to the use of a stranger (*n*).

Where a bill of lading had been signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on his paying freight, the document was held to be evidence to show that the consignee had an insurable interest in the goods (*o*); but if in such case the master should guard his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading, it is said, would not be evidence either of the quantity of the goods, or of property in the consignee (*p*).

In *Lord Torrington's case* (*q*), the evidence was, that according to the usual course of the plaintiff's dealings, the draymen came

By agents in the course of trade.

enjoying the appointment of collectors, together with the internal evidence of the documents, and their coming out of the proper custody, amounts to sufficient proof that the parties were really collectors. *Ib*. In case for disturbance of the plaintiff's market, accounts signed by a party styling himself the steward's clerk, without any evidence to show that he was such, *dehors* the papers themselves, and not purporting to charge the party whose signature they bore, were on motion held to be inadmissible; and the Court not being satisfied that such evidence might not have weighed with the jury, granted a new trial. *De Ratzen, Baron, v. Farr*, 5 Nev. & M. 617.

(*k*) *Doe v. Thynne*, 10 East, 206.

(*l*) In the case of *Doe v. Thynne*,

10 East, 206, the language of several entries imported that *N. W.* was therein accounting to the Dean and Chapter for money paid to himself, with the receipt of which he debited himself by the words *solvit mihi*, and *solvit per me*; and the Court of King's Bench were of opinion that the books which had been rejected at the former trial ought again to be submitted to the consideration of the Judge.

(*m*) *Spires v. Morris*, 9 Bing. 604.

(*n*) *Anon. Lord Raym.* 745. *Qu.* under what circumstances. The report is a very loose one.

(*o*) *Per Lawrence, J., Haddow v. Parry*, 3 Taunt. 303.

(*p*) *Ibid.*

(*q*) *B. N. P.* 282.

By agents
in the
course of
business.

every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book to which the draymen set their hands, and that the draymen were dead, and that the entry was in his handwriting; and it was held to be good evidence of a delivery.

In the case of *Clerk v. Bedford* (r), where the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, the evidence was rejected by Lord Raymond, who distinguished it from *Lord Torrington's case*, because there the witness saw the draymen sign the book every night.

In the case of *Pitman v. Maddox* (s), in an action upon a tailor's bill, a shop-book was produced, written by one of the plaintiff's servants, who was dead; and upon proof of the death of the servant, and that he *used to make such entries*, it was allowed to be good evidence of the delivery of the goods (t). From these cases it may be inferred that some evidence ought to be given to show that such entries were made in the usual routine of business; but perhaps it may not be necessary, as in *Lord Torrington's case*, to prove the signature by one who saw it written.

In *Chambers v. Bernasconi* (v), the action was brought by the plaintiff to try the validity of a commission of bankruptcy issued against him. He had been arrested on the 9th of November 1825, and it was a question material to the act of bankruptcy, whether he had been arrested in Southmolton-street, or at his cottage, Maida-hill, Paddington. In order to establish an act of bankruptcy by keeping house, &c. at Paddington, the officer who arrested the plaintiff being dead, his follower was called, who swore that the arrest took place at Paddington. The plaintiff, to establish an arrest in Southmolton-street, offered in evidence, from the files of the office of the under-sheriff of Middlesex, a paper annexed to the writ, signed by the deceased officer, and addressed to the under-sheriff of Middlesex, as follows:

"9th Nov. 1825. I arrested H. Chambers in Southmolton-street, at the suit of *W. B.*"

By the course of office the officer was required, immediately after the arrest, and before taking a bail-bond, to transmit to the sheriff's office a memorandum or certificate of the arrest; and for the last few years (but, according to one report of the case (w), not, as it

(r) 1 Salk. 285; Ld. Raym. 875.

(s) Lord Raym. 732; 2 Salk. 600.

(t) See B. N. P. 242.

(v) 1 Tyrw. 335.

(w) 1 C. & J. 451.

seems, at the time of arrest) an account of the *place of arrest* had also been required from them. On such returns the officer and his sureties are charged by the sheriff, and returns are made upon them; the evidence was admitted, and the plaintiff had a verdict. Upon a motion for a new trial it was contended, on the part of the plaintiff, that the document was admissible, as being a written declaration of a fact made by a person peculiarly cognizant of the fact, and against his interest. The Court of Exchequer held, that the evidence was inadmissible. Lord Lyndhurst, C. B., was of opinion that the principle contended for went beyond the former cases. Bayley, B., was of opinion that the instrument was not admissible in evidence at all, inasmuch as the entry could not be said to militate against the interest of the officer: and he also intimated his further opinion, that although the instrument was admissible, it would not be admissible to prove the circumstance of the place where the arrest occurred, as it was no part of the officer's duty to state the *place* where the caption took place.

By agents
in the
course of
business.

In the case of *Digby v. Stedman (x)*, an entry made by a defendant himself in the course of business, and contemporary with the fact, was received as confirmatory evidence to prove the delivery of a watch. Again, in *Hagedorn v. Reed (y)*, the entry by a deceased clerk of a merchant, in the letter-book, of a letter, with a memorandum, stating that the original had been sent to a particular person, was held to be evidence of the fact; proof having been given that it was the invariable course of that merchant's office, that the clerk who copied any letter sent it off by the post, and made a memorandum on the copy that he had done so.

In the following case the principle seems to have been carried much farther. Upon an issue out of Chancery, to try whether eight shares of Hudson's Bay stock, bought in the name of Mr. Lake, were bought in trust for Sir S. Evans, his assigns (the plaintiffs) showed, first, that there was no entry in the books of Mr. Lake relating to this transaction; secondly, that six of the receipts

(x) 1 Esp. C. 129.

(y) 3 Camp. 379. See also *Pritt v. Fairclough* (3 Camp. 305), where similar evidence was received. *Champneys v. Peck*, 1 Starkie's C. 404, *infra*. In the case of *Calvert v. The Archbishop of Canterbury*, 2 Esp. C. 645. Lord Kenyon held, that an entry made in the plaintiff's books, by a servant since deceased, of a contract made with the defendant, was not

admissible in evidence to prove the terms of the contract; because the entry did not, as in the case of *Price v. Lord Torrington*, charge the clerk. It does not appear that in this case, the clerk, in making the memorandum, professed to have made it personally with the defendant, or his agent; and he might, for anything that appeared to the contrary, have made it on hearsay from the plaintiff himself.

Entry in
the usual
course of
professional
business.

were in the handwriting of Sir S. Evans, and there was a reference on the back of them by Jeremy Thomas, Sir S. Evans's book-keeper, to the book B. B. of Sir S. Evans; J. Thomas was proved to be dead, and the Court of K. B., on a trial at bar, admitted the book so referred to, not only as to the six, but likewise as to the other two in the hands of Sir Biby Lake, the son of Mr. Lake (z).

In the case of *Smurtle v. Williams*, where the question was whether certain mortgage-money had really been paid, a scrivener's book of accounts (the scrivener being dead) was held to be good evidence of payment (a).

Upon a trial at bar, where the question was, whether a surrender of the mother's estate for life had been made when the son suffered a common recovery, the Court admitted in evidence the debt book of an attorney (deceased), in which he had made charges for suffering the recovery, and for drawing and ingrossing a surrender of the mother, which had been *paid*; and the Court held, that this was a material circumstance upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for that purpose; and that since the attorney was dead, this was the best evidence (b). So in the case of *Higham v. Ridgway* (c), it was held, that an entry made by a man-

(z) B. N. P. 282. And here it may be remarked, that although the statute 7 Jac. 1, c. 12, enacts that a shop-book shall not be evidence after the expiration of a year, it does not therefore make it evidence within the year, except under special circumstances (2 Salk. 690); and that in some cases it is evidence after the expiration of the year.

(a) B. N. P. 283. In this case it does not appear that the attorney, by the entry in his book, had admitted the payment of the money. Where the house of the party in whose custody marriage articles ought to have been, was proved to have been occupied and pillaged by rebels, and that after diligent search amongst his other papers, they could not be found, it was held that a recital of them in a case submitted to counsel at the time, and charged for and entered as paid by the family attorney, was admissible as secondary evidence. *Lord Lorton v. Gore*, 1 Dow, N. S. 190.

(b) *Warren v. Grenville*, Str. 1128. Note, this was forty years after the time of the surrender, and the Court said that

they would have *presumed* a surrender after such a length of time, without this additional evidence. In *Goodtitle v. Duke of Chandos*, 2 Burr. 1072, Lord Mansfield says, that the Court did rely upon the entry; but he also states from his own note, that the Court said, that after forty years they would, without any other circumstances, presume a conditional surrender. See also the last preceding note. In *Doe v. Wright*, Lancaster Summer Assizes, 1836, Coleridge, J. admitted a bill of costs by an attorney, stating facts and business done, and which had been paid, on the same footing as original entries in the book.

(c) 10 East, 109. The evidence seems to have been received in this case principally upon the ground, that the entry was made of a fact within the peculiar knowledge of the party, against his interest; and Le Blanc, J., seems to have founded his assent, partly at least, on the particular nature of the fact, as being matter of pedigree.

See the observations of Littledale, J., in *Doe v. Vowles*, 1 Mo. & R. 61. App. 362.

midwife in his book, of having delivered a woman of a child on a particular day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, was evidence upon the trial of an issue as to the age of such child at the time of his afterwards suffering a recovery.

Entry in the usual course of professional business.

It was held, in the case of *Doe v. Robson* (*d*), that entries of charges, made by an attorney in his books, showing the time when a lease prepared for a client of his was executed, which charges, it appeared, had been paid, were evidence after the attorney's death to show the time of the execution, which was a material fact in issue. And in this case it is observable, that the ground of receiving the evidence was expressly stated by Lord Ellenborough to be the total absence of interest in the person making the entry to pervert the fact, and at the same time a competency in him to know it, without laying stress upon the fact that the charges had been paid (*e*).

In the case of *Skipwith v. Shirley* (*f*), a decree was made for raising money under a deed of appointment, although the only copy produced did not appear to be executed, upon recitals of it in a deed of settlement as a subsisting effectual deed, and evidence from the books of a deceased solicitor of charges for the preparation and execution of it, although there was no evidence that these had been paid.

So in *Champneys v. Peck* (*g*), the plaintiff, in order to prove the delivery of his bill as an attorney, proved the death of Dawling, who had been his clerk, and produced the bill, with an indorsement on it in the handwriting of the deceased clerk, "March 4th, 1815, delivered a copy to Mr. Peck." The plaintiff further proved that the indorsement existed at the time when, according to its purport, the bill had been delivered; that it was the business of Dawling to deliver the bill; and that such an indorsement was usually made in the common course of business upon the copy kept. Lord Ellenborough held this to be *prima facie* evidence of the delivery of the bill, and the plaintiff had a verdict (*h*).

(*d*) 15 East, 31.

(*e*) Bayley, J. adverted to that fact; see the observations of Le Blanc, J. in *Higham v. Ridgway*, 10 East, 109.

(*f*) 11 Ves. 64.

(*g*) 1 Starkie's C. 404. Where the notary's clerk, who presented a bill dishonoured, made an entry at the time, in the usual course of business, held that upon

proof of his death such entry was admissible. *Poole v. Dicus*, 1 Bing. N. C. 649. And see *Doe d. Pattishall v. Turford*, 3 B. & Ad. 800.

(*h*) The cause was undefended. The ruling of Lord Ellenborough in this case has been questioned more than once, but seems to be now confirmed. *Vide supra*, note (*g*).

In the case of *Pyke v. Crouch* (i), it was held, that a letter written by a stranger to a testator, acknowledging the receipt of a will, was evidence to show that such a will had been sent by the testator.

Entry by a
rector.

An entry by a rector of his receipt of tithes is evidence for his successor; for the entry could not have been of any benefit to himself (j). Lord Kenyon, however, considered this as an excepted case, since, in general, a man's private entry cannot affect the rights of third persons (k); and therefore, in *Outram v. Morewood* (l), where the question was, whether a particular close was part of an estate which formerly belonged to Sir J. Zouch, it was held, that entries of the receipt of rents, made by one from whom the defendant derived his title to the rent of this close, but nothing more, was not evidence for the defendant in order to prove the identity of the close, and to establish his title to the coals, on the ground that the entries were no more than the private memorandum of the party, not upon oath, which ought not to bind third persons; and that it was distinguishable from the case of *Barry v. Bebbington*, since there the steward charged himself with the receipt of the money. It appears, therefore, to be clear, that a man's own private entry, as to his own rights, which admits no liability to another, is not evidence either for himself or those who claim under him. The case of an entry of the receipt of tithes by the rector stands upon very peculiar grounds; he has no personal interest in making the entry with a view to any claim made by himself, since the entry would not be evidence for him; and the incumbent for the time being, and not his heir or personal representative, would afterwards derive benefit from such entry.

Lord Hardwicke observed, that it was going a great way to admit the books of a deceased rector as evidence for his successor (m), but that it had been allowed, because the rector knew that the entry could not benefit either himself or his representative, who had nothing to do with the living (n). The admissibility of

(i) *Ld. Raym.* 730.

(j) 5 T. R. 123; *Bunb.* 46; 2 Ves. 43. So in a suit for tithes by the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, ancient documents in their possession, and purporting to be accounts furnished by some of their members employed to collect the tithes, and appearing to be offered and settled, are admissible in evidence. *Short v. Lee*, 2 Jac. & W. 464. The admissibility in this case seems to rest on the principle just adverted to. An entry by a deceased rector is also evidence by way of admission against a successor. An ancient document

signed by the rector, and headed, "notification of the tithes of the parish," although not coming out of the proper repository of a terrier, was held to be admissible evidence against a succeeding rector, as the admission of one of his predecessors, and upon the same principle as a receipt. *Maddison v. Nuttall*, 6 Bing. 226.

(k) 5 T. R. 123.

(l) *Ibid.*

(m) 2 Ves. 43; and see *Illingworth v. Leigh*, 4 Gwill. 1618. *Woodnoth v. Lord Cobham*, 2 Gwill. 653.

(n) Such evidence has, however, been received in favour of his successor where

such evidence seems to rest upon the principles (o) lately announced.

The declarations of (p) deceased tenants have in some instances been admitted in evidence, on matters connected with their tenancies, principally, as it seems, upon the ground that their declarations were made against their own interest.

Declarations by tenants since deceased.

In *Doe v. Williams* (q), the question was, whether Mrs. Galton (from whom the defendant claimed) was in possession of the premises at the time when she levied a fine; and evidence was admitted by Lord Mansfield of a conversation between Mrs. Galton and Mrs. Pearce (who was living, but interested as being the present tenant), in which the one admitted that she had paid rent to the other as her landlord, and the other admitted that she had received the rent (r). In *Davies v. Pearce* (s), which was an action of replevin, the question was, whether the *locus in quo* was parcel of the tenement B.; evidence was offered by the plaintiff of declarations by deceased tenants of the *locus in quo*, which was part of L., that they rented L. of Mr. Evans, who was never the owner of B.; that one tenant had said, that he paid Mr. Evans five shillings yearly; and a quarter of mutton, for L., and that he was *then going* to pay the said rent to the said J. Evans for the said L.; and that he had ordered his servant to herd some cattle at L., saying, that otherwise he could not afford to pay Mr. Evans his rent. And that another tenant had prevented a person from cutting rushes on L., and threatened that he would tell Mr. Evans, his landlord, of his

the entries have been made by an improper rector, although there the party who made the entries might benefit his own inheritance. Barr. 46; 4 Gwill. 1618; 2 Gwill. 653; Bunb. 180; but see *Le Gross v. Lovemoor*, 2 Gwill. 527. *Perigul v. Nicholson*, 1 Wightw. 63. Lord Kenyon's observations, *Outram v. Morewood*, 5 T. R. 123.

(o) *Supra*, 346; and see Lord Ellenborough's observations in *Doe v. Rawlins*, 7 East, 282, n.

(p) Oral declarations depend partly upon the same principles with written entries, but are far weaker in degree; they are usually made with less deliberation, are more likely to be loosely and wantonly made, and are usually unconnected with any regular course and routine of business. The declarations of tenants are not evidence against reversioners although their acts may be. Per Paterson, J. in *Tickle v. Brown*, 4 Ad. & Ell. 378.

(q) Cowp. 621.

(r) It is observable that the verdict, notwithstanding the admission of the evidence, was for the plaintiff; consequently, no question was afterwards made before the Court as to the admissibility of this evidence. The evidence itself appears to have been extremely loose, the witness not stating either the occasion or the terms of the conversation, but merely that he remembered a conversation, in which the one admitted that she had paid the other rent as her landlord, and the other that she had received rent from her as tenant. Much in such a case would depend on the object of the conversation, as well as the terms: a settlement of account between the parties as landlord and tenant, as it would bind both, would weigh in evidence as an act done, in the same manner as payment and rent.

(s) 2 T. R. 53.

By tenants
since de-
ceased.

cutting the said rushes; and once took the said rushes from that person, and told him that they belonged to Mr. Evans. And that forty years ago *T. H.* rented *L.* for one year, and said that he paid rent either to Mr. Evans or his mother; this evidence was rejected at the trial, and a bill of exceptions was therefore tendered; and the Court of K. B. was of opinion that the evidence was admissible (*t*). Ashurst, J., observing that the fact of cutting rushes was decisive, and Buller, J., adding, that the other question, relating to the tenant's declaration that he had paid rent for the premises, had been decided in the cases of *Holloway v. Rakes*, and *Doe v. Williams* (*u*).

In the case of *Holloway v. Rakes* (*w*), cited by Mr. J. Buller, the question was, whether the deviser of an estate twenty-seven years ago, of which there had been no possession, was seised; and a declaration of a tenant in possession at that time, that he held as tenant to the deviser, was admitted. And the Court afterwards held that it had been properly admitted (*x*).

In the case of *Peaceable v. Watson* (*y*), it was held, that the declaration of a deceased tenant, of his holding the land of a particular person, was evidence to prove the seisin of the latter, upon the ground (as it seems) that the declaration was against his own interest, since it might have been made use of as evidence against him.

In the case of *Walker v. Bradstock* (*z*), where the plaintiff claimed a prescriptive right of common, pur cause of vicinage, as appurtenant to his messuage, it was held that a declaration by a

(*t*) It was not essential, in this case, that the Court should give a decided opinion on the mere declarations of the tenants, since other evidence had been rejected; viz, of the fact of cutting down the rushes, and the accompanying declaration which rendered it incumbent to award a *venire de novo*.

Mr. J. Ashurst seems to have founded himself upon that point only; Mr. J. Buller indeed went farther, and intimated his opinion upon the bare declarations. It is, however, to be observed, that the case of *Doe v. Williams* does not support that opinion to the full extent: for there the evidence did not rest as a mere declaration to a stranger, but occurred in the course of conversation between the parties, as to a supposed account between them as landlord and tenant; it was of the same na-

ture, though weaker, with evidence of an actual payment; and if the letting was by parol, it would have been difficult to have given other evidence of the relation between the parties than their actual dealings and communications on the subject.

(*u*) *Supra*, 305.

(*w*) 2 T. R. 55.

(*x*) It is to be remarked, that the Court seem to have doubted upon the propriety of admitting such evidence in general, since they resorted to another principle to support the admission in that case, namely, the probability that the defendant derived title from the tenant who made the admission, and was therefore bound by it. See, however, *Doe v. Green*, 1 Gow. 227.

(*y*) 4 Taunt. 16.

(*z*) 6 Esp. C. 458.

former occupier of the plaintiff's messuage, forty years ago, since dead, that his cattle had been impounded on Corfe Lown (where common was claimed), was admissible; and also that declarations by another occupier, though still living, of his opinion that he had no such right of common appurtenant to the messuage, were admissible, on the general ground that the declarations of tenants against their own rights are evidence. It cannot but be remarked that such evidence, to say the least, is exceedingly weak: the declarations were not used as explanatory of any fact, and seem to be scarcely warranted on the ground of being against interest.

By tenants
since de-
ceased.

In the case of *Barber v. Ray*, an issue was directed by the Court of Chancery, to try whether Edmund Barker the elder, by his will (since his death succeeded, &c. by Edmund Barker, his nephew), devised certain estates, &c.; upon the trial evidence was offered of declarations made by Elizabeth Barker, the widow of Edmund the nephew, both before and after the death of Edmund the nephew, tending to show that her husband and the other nephews were only tenants for life. The evidence was rejected, and the jury having found for the defendants, the Lord Chancellor, on an application made by the plaintiff for a new trial, on the ground (amongst others) that the evidence ought to have been received, refused it, without deeming it to be necessary to give any opinion as to the admissibility of the evidence. Here it is observable, that the declarations offered in evidence were neither coupled with any act, nor made in the discharge of any office or duty, but were the mere voluntary declarations of the wife on her husband's affairs.

In some instances, as will afterwards be more particularly considered under the head of Admissions, the declarations of a former owner are evidence in respect of the subject-matter of ownership (*a*). And such declarations are admissible as original evidence, although

(*a*) See Vol. II. tit. ADMISSIONS. In *Woolway v. Rowe*, 1 Ad. & Ell. 114, the question was whether Scorhill was parcel of plaintiff's estate, or part of the waste of a manor, the plaintiff having no other interest than right to turn on cattle; and evidence was admitted of a declaration by a former owner and occupier of plaintiff's estate, that he had no right to enclose the down (the *L. I. Q.*), the evidence was admitted, although the former owner was alive, and in Court, on the ground of *identity of interest*; and, consequently, as an admission. *Semble*, that the principle, such as it is, of

admitting such evidence, is to explain a negative, *i. e.* the *omission* to enclose. An act of enjoyment, or of right exercised, is admissible; an accompanying declaration is also evidence to explain the nature of the act. And *semble*, a declaration may be also evidence to explain why the party abstained. Declarations by persons holding negotiable security, under the *same title*, are admissible; but the right of a party holding under a good title is not to be cut down by the acknowledgment of a former owner that he had no title. Per Parke, J., 1 Ad. & Ell. 116.

the person who made them be still living (*b*); declarations, however, made after such interest has ceased are not admissible (*c*).

Proof of
private in-
struments.

Next, as to the proof of private instruments. The proof of a deed, agreement, or other instrument, is either, *First*, by witnesses; *Secondly*, by admission; or, *Thirdly*, by enrolment. If by witnesses, the instrument must be produced (*d*), or be proved to have been *lost*, or destroyed, or legally unattainable (*e*), or to be in the possession (*f*) of the adversary (*g*), or in the custody of the Court of Chancery, &c. If produced, it is either attested or not attested (*h*). If attested, the attesting witness must be called (*i*), or his absence must be accounted for (*k*), and his handwriting proved (*l*); or it must appear that the instrument is thirty years old (*m*), and came out of the proper custody (*n*). If it be not attested, the handwriting of the obligor should be proved (*o*). If it has been *lost*, or destroyed, or so situated that its production cannot be enforced, proof must be given of the fact (*p*), and that it was regularly stamped and executed (*q*), and then secondary evidence must be given of its contents (*r*). If it be in the adversary's possession, proof must be given of such possession (*s*), and of notice (*t*) to produce it, and of its regular execution (except in some particular instances), and of its contents (*u*).

Production. In order to prove a deed, agreement, or other private instrument, it is necessary first to *produce* the deed, or to excuse the omission by proof that it has been lost or destroyed, or is in the hands of the adversary, who has had notice to produce it. For the best evidence of the contents of a written instrument consists in the actual production of the instrument; and secondary evidence of it cannot be admitted, until the impossibility of producing it has been mani-

(*b*) *Ibid*.

(*c*) *Doe v. Webber*, 3 N. & M. 580.
Vol. II. tit. ADMISSIONS.

(*d*) *Infra*, p. 368.

(*e*) Secondary evidence was held to be inadmissible of a letter filed in the Court of Chancery, it being in the power of either party to produce it on application to the Court. *Williams v. Munnings*, Ry. & M. 18.

(*f*) If the instrument be in the custody of a third person, its production is usually enforced by means of a writ of *subpoena duces tecum*. For the proceedings upon this writ, see the title, *SUBPOENA DUCES TECUM*.

(*g*) In many instances the Court will

assist a party in obtaining an inspection or copy of the instrument, on motion. See tit. INSPECTION.

(*h*) *Infra*, p. 370.

(*i*) *Infra*, p. 371.

(*k*) *Infra*, p. 375.

(*l*) *Infra*, p. 379.

(*m*) *Infra*, p. 381.

(*n*) *Infra*, p. 383.

(*o*) *Infra*, p. 386.

(*p*) *Infra*, p. 387.

(*q*) *Infra*, p. 393.

(*r*) *Infra*, p. 393.

(*s*) *Infra*, p. 398.

(*t*) *Infra*, p. 400.

(*u*) *Infra*, p. 393. 407.

ferred to the Court (*x*). Where the deed has been pleaded with a profert, the production cannot be supplied by proof of the party's inability to produce the deed (*y*).

If, upon production of a deed, any rasure or blemish appear upon the face of the instrument, the party producing it ought to explain how the defect arose (*z*), and to show that it was made before the execution of the deed, or that it was made after the delivery, by a stranger, if the rasure or interlineation has been made in an immaterial point (*a*). If the deed appear to be mutilated, it is *prima facie* evidence of cancellation (*b*); but proof may be given that the cancelling was by accident (*c*), or that it was effected by fraud and improper practice (*d*). If in the course of the inquiry the time of the delivery should become material, it should be proved by the attesting witness, if there be one, and if not, the date of the deed will be evidence of the time of delivery. If the erasure existed previously, the fact may be proved by any person who saw it; but the state of the deed at the time of its execution is best proved by an attesting witness, if he recollects it. Where a deed operates as to different parties from the time of execution by each, it will be binding on one who conveys by that deed, if complete as to him at the time, although it has been

(*x*) In some cases, however, where the deed has been enrolled, an examined copy of the enrolment is evidence. See ENROLMENT. And a duplicate original is evidence, as in the case of an attorney's bill. *Anderson v. May*, 2 B. & P. 237. See also Vol. II. tit. NOTICE. *Jory v. Orchard*, 2 B. & P. 30. An acknowledgment of the execution of a deed by the obligor is insufficient. *Abbott v. Plumb*, Dougl. 216. Though made in an answer in Chancery. *Call v. Dunning*, 4 East, 53. A bill of exchange must be produced in order to prove its identity with one admitted to have been received by the defendant, and paid into his banker's, although no other has been received by the banker. *Atkins v. Ellis*, 2 Ad. & Ell. 35.

(*y*) *Smith v. Woodward*, 2 East, 585. In such case the party who has made the profert should move to amend before the trial. 2 East, 585. It will be too late to make the application at the time of the trial. 1 Starkie's C. 74.

(*z*) *Henman v. Dickenson*, 5 Bing. 183; B. N. P. 255; Gil. L. Ev. 80. See *Knight*

v. Clements, App. Vol. II. 369, and tit. BILL OF EXCHANGE—DEED—POLICY—WILL.

(*a*) *Perrott v. Perrott*, 14 East, 423.

(*b*) See *As to the effect of cancellation*, Vol. II. tit. DEED. *Doe v. Bingham*, 4 B. & A. 672. The insertion by a stranger of "hundred," between "one" and "pounds," in the condition of a bond, consistent with the obvious sense, is immaterial. *Waugh v. Russell*, 1 Mars. 311; 5 Taunt. 707. *Semble*, that a letter, a considerable part of which appears obliterated, is not evidence. 1 Anst. 227.

(*c*) *Latch*, 226; *Palm*, 403; 1 Mod. 11. *R. v. Skibthwaite*. Certificate of 1774, from the parish chest, one of the names of the allowing justices was wanting; the certificate being in a torn and decayed state, the Court held that the finding of the justices below of the due making of the certificate, was conclusive of the fact. Mich. 1833. Or that it was done under a mistake. *Perrott v. Perrott*, 14 East, 423.

(*d*) *Hetl*, 138, *Bucknow's case*.

executed by another party at a time when blanks were left which were immaterial to that party (*e*).

Stamp.

It should appear, on the production of the instrument, that it is properly stamped (*f*). And where a stamp is required, the objection for the want of one ought to be taken in that stage, and before the document is read (*g*). Although inrolment of the deed be essential, it is not incumbent on the party who relies on the deed to prove the inrolment; it lies on the party objecting to prove the negative (*h*).

Proof by
attesting
witness.

The next step is to prove the legal requisites essential to the existence of the document, as a deed, simple contract, bill of exchange (*i*), will (*k*), or other instrument (*l*).

If the deed or instrument produced purport to have been attested by one or more witnesses, whose names are subscribed (*m*), the

(*e*) A mortgagee conveyed to the mortgagor the legal estate, on being paid the mortgage-money, and the latter re-conveyed to trustees to secure the payment of an annuity: at the time of execution by the mortgagee, the deed contained blanks for sums to be received by the mortgagee from the grantees of the annuity, and these were all filled up before the execution of the deed by the mortgagor, but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held that the whole might be considered as one transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all the conveying parties; and that the deed operated as a good conveyance of the estate from the mortgagor to the trustees. *Doe v. Bingham*, 4 B. & A. 672. Where a blank was left in a composition deed at the time of execution, in order to ascertain the amount, but filled up the next day, and signed, a re-execution was presumed. *Hudson v. Revett*, 5 Bing. 368.

(*f*) See tit. STAMPS, and tit. BILLS OF EXCHANGE, &c. As to compelling the production of documents for the purpose of inspection, or of procuring them to be stamped, see Vol. II. tit. INSPECTION. The general rule is that the Court will not make such an order unless the applicant be either an actual party to the instrument, or a party in interest. *Ib. Osborne v. Taylor*, 4 Taunt. 159. 162. *Brown v.*

Rose, 6 Taunt. 283. *Bateman v. Phillips*, 4 Taunt. 157. *Johnson v. Lewellyn*, 6 Esp. C. 101; 1 Taunt. 386. Nor then where each has his own part. *Ratcliffe v. Bleasby*, 3 Bing. 148. *Pickering v. Noyes*, 1 B. & C. 262. *Street v. Brown*, 6 Taunt. 302. In an action between A. and B., the Court refused a rule to compel B. to produce, for the purpose of being stamped, an agreement between B. and C., although it appeared by an affidavit of C.'s that the act complained of by A. arose out of this agreement. *Lawrence v. Hooker*, 5 Bingh. 6.

(*g*) And the objecting party ought to be prepared to support his objection, by producing the Act.

(*h*) *Doe v. Bingham*, 4 B. & A. 672.

(*i*) See BILL OF EXCHANGE.

(*k*) See WILL.

(*l*) In general, for the particular proof, see the title of the instrument itself. Circumstances necessary to make a document evidence must be proved *aliunde*, and not from the document itself; in order, therefore, to make entries by a corporator evidence, it must be first shown by other evidence that he was a corporator. *Davies v. Morgan*, 1 Cr. & J. 587.

(*m*) Where the seal of the Bank of England had been affixed by a paper wafered to an indenture, on which paper was written, "sealed by order of the Court of Directors of the Governor and Company of the Bank of England, 12th December 1833. A. B. secretary," it was

party must call at least one of the witnesses; and in cases where the instrument labours under any doubt or suspicion, he ought to call them all.' The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others (*n*). So rigid is this rule (*o*), that it is not superseded, in the case of a deed, by proof of any admission or acknowledgment of the execution by the party himself (*p*), whether the action be brought against the obligor himself, or against his assignees after his bankruptcy (*q*); nor by proof of an admission of the execution, made by the defendant in his answer to a bill in equity (*r*). The rule applies, whether the question be between the parties to the deed, or strangers (*s*); whether the deed be the foundation of the action, or but collateral (*t*); or whether it still exist as a deed, or has been cancelled (*u*); and although the issue be directed by a Court of Equity to try the date, and not the existence of a deed (*x*). Upon an indictment against an apprentice for a fraudulent enlistment, it was held that the indentures must be proved in the regular way (*y*). And the same rule applies to all written agreements and other instruments attested by a witness, as

Proof by
attesting
witness.

held that it did not appear that *A. B.* was an attesting witness. The statement was considered to be a mere memorandum that the party signing was the person deputated to affix the seal. *Doe d. Bank of England v. Chambers*, 4 Ad. & Ell. 412.

(*n*) *Doe v. Durnford*, 2 M. S. 62. *R. v. Jones*, E. P. C. 822; 1 Leach, 238, 3d edit. *R. v. Harringworth*, 4 M. & S. 350; Burr. 2275; Peake's C. 30; 2 Esp. C. 697. The defendant would otherwise be deprived of the opportunity of cross-examining the witness as to the time of execution. Per Ashurst, J., in *Abbott v. Plumbe*, Doug. 205.

(*o*) Formerly (as has already been observed, *supra*), it was the practice to try the existence of a disputed deed *per patriam et testes*; that is, the witnesses to the deed were sworn as part of the jury.

(*p*) *Abbott v. Plumbe*, Doug. 205; 2 East, 187; 7 T. R. 267. Although the acknowledgment be made in court. *Johnson v. Mison*, 1 Esp. C. 89. *Abaddon v. Anderton*, 3 Leon, 84, note (*n*); vide etiam, *Luig v. Raine*, 2 B. & P. 85. See the

observations of Lawrence, J., on the case of *Abbott v. Plumbe*, 7 T. R. 267; and of Lord Ellenborough, *R. v. Harrington*, 4 M. & S. 353. *Jones v. Brewer*, 4 Taunt. 56. The attesting witness must be called, although he be the real party in the cause. *Honeywood v. Peacock*, 3 Camp. 196. But payment of money into court on one of the breaches of covenant assigned, amounts to an admission of the deed, although *non est factum* has been pleaded. *Randall v. Lynch*, 2 Camp. 357. And admissions are binding which are made by a party or his attorney, with a view to the trial of the cause. *Infra*.

(*q*) *Abbott v. Plumbe*, Doug. 205.

(*r*) *Call v. Dunning*, 4 East, 53. *Bowles v. Langworthy*, 5 T. R. 368. *R. v. Middlezoy*, 2 T. R. 41.

(*s*) 4 East, 53.

(*t*) *Manners v. Postan*, 4 Esp. C. 239.

(*u*) *Breton v. Cope*, Peake's C. 30.

(*x*) *Edinburgh v. Crudell*, 2 Starkie's C. 284.

(*y*) *R. v. Jones*, E. P. C. 822. *R. v. Harringworth*, 4 M. & S. 350.

for instance, a notice to quit in ejectment (z), in which case it was held, that proof of the service of the notice upon the tenant, and that it was read over to him without his making any objection, was not sufficient.

Where the plaintiff avers that the defendant was bound by an indenture, the fact may be proved by the production and proof of the execution of the part executed by the defendant (a).

Proof of
the sealing
of a deed.

Where the subscribing witness is called to prove the execution of the deed, the proof consists, First, of the sealing; Secondly, the delivery. First, the sealing need not be with the seal of the obligor, and need not have been actually made at the time; it is sufficient if the obligor acknowledge any impression already made to be his seal (b); and it seems that one piece of wax will suffice for several obligors, if they make distinct and several prints upon it (c). In *Lord Lovelace's case* (d), it was said that if one of the officers of the forest put one seal to the rolls by the assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all. And if one partner, in the presence of the other, seal and deliver a deed of sale for both, it is binding upon both (e). Where a deed is executed under some special authority, which prescribes the mode and form of execution, the execution will not be valid unless those requisites be observed. Where a certificate under the statute 8 & 9 W. 3, c. 30 (which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens), was signed by two churchwardens and one overseer, but bore two seals only, the Court held that it was not a valid certificate. They said that it was the case of an execution of a power, and that in the execution of powers all the circumstances required by the creators of the power, however unessential

(z) *Doe v. Durnford*, 2 M. & S. 62. *Stone v. Metcalf*, 1 Starkie's C. 53. See also *Higgs v. Dixon*, 2 Starkie's C. 180, where the same was held as to an attested warrant to distrain.

(u) *Burleigh v. Stibbs*, 5 T. R. 465. In an action by the lessor against the assignee of the lessee, the plaintiff having proved the execution of the counterpart, and that the original had been delivered over to the defendant, it was held that he was not bound to prove the execution of the original, which was produced by the de-

fendant out of the hands of a third person, to whom he had assigned it, over by a deed reciting the original lease. *Burnett v. Lynch*, 5 B. & C. 589; and 8 D. & R. 368. It is not competent to a party, who has taken under a deed all the interest which it gives, to dispute its due execution. *Ibid.*

(b) Com. Dig. tit. *Fait*.

(c) Sheph. Touchst. 55; Perkins, c. 2, s. 134.

(d) Sir W. Jones, 268.

(e) *Ball v. Dunsterville*, 4 T. R. 313.

and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance (f). Deed. proof of sealing.

In the case of *Adam v. Ker*, on an action on a bond alleged to have been sealed, evidence was admitted to prove a custom in Jamaica (where the bond in question had been executed), by substituting a mark with a pen for a seal. The Court of Common Pleas, after a verdict for the plaintiff, subject to the opinion of the Court, granted a rule *nisi* to set aside the verdict and enter a nonsuit, but no decision was given (g).

No particular form of delivery is requisite; it is sufficient if the obligor, by any act, indicate his intention to put the deed into the possession of the other party, as by throwing it down upon the table for the other to take it up. So if a stranger deliver it with the assent of a party to the deed (h). If the deed be made by a corporate body, it is sufficient to prove that it was sealed by the corporate or any other seal which was used for the occasion, without proving a delivery of the deed (i). But if the corporation, by their letter of attorney, have appointed an agent to deliver the deed, it is not their deed till delivery (k). Where a deed is executed by virtue of a power of attorney from the obligor, the power of attorney must be proved (l). Proof of the delivery of a sealed instrument will be evidence that the party adopts and acknowledges the seal to be his; and proof that he wrote his name opposite to the seal affords presumptive evidence of the sealing and delivery of a deed in which it was affirmed that he sealed it (m). Proof of delivery.

Where there are several attesting witnesses, it is sufficient in point of law to call one only (n), and that even in the case of a will, provided he can prove the execution of the will by the testator, and that he and the rest of the witnesses subscribed their names in the presence of the testator (o). But if any suspicion attach to the execution, it is prudent to call all the witnesses (p). Proof by one of several attesting witnesses.

(f) *R. v. Austrey*, Easter Term, 1817. *Hawkins v. Kemp*, 3 East, 440. See tit. POWER, and Sir E. Sugden's Treatise on Powers, where the whole subject of Powers is most skillfully treated.

(g) 1 B. & P. 360.

(h) Com. Dig. Ev. A.; Co. Litt. 36, a. *Thoroughgood's case*, 9 Rep. 137, a. *Murray v. Earl of Stair*, 2 B. & C. 82. A boy and his father went to execute an apprentice deed, binding the son, they desired a person to write their names opposite to two seals, which was done; they took the instrument to the master, and left it with him. This was held to be a

sufficient execution. *R. v. Longnor Inhab.* 4 B. & Ad. 647.

(i) Perk. c. 2, s. 132. The name used must be the same in substance with the true name, but need not be the same in words and syllables. *Case of Mayor and Burgesses of Lynn*, 10 Coke, 124. *Croydon Hospital v. Finley*, 6 Taunt. 467.

(k) Co. Litt. 36, a.

(l) *Johnson v. Mason*, 1 Esp. C. 89.

(m) *Talbot v. Hodson*, 7 Taunt. 251.

(n) Str. 1254.

(o) B. N. P. 264; 1 P. Wms. 471.

(p) 4 Burr. 2224.

State of the instrument.

It is not necessary that the witness who proves the sealing and delivery should also be able to prove the state of the instrument at the time of execution, and that all the blanks were then filled up. In practice, indeed, it seldom happens that a witness can prove more than the sealing and delivery of the deed, and the identity of the parties (*g*). Where the subscribing witness to a bond stated that he saw it executed by a person who was introduced by the name of Hawkshaw (the name of the defendant), but was unable to identify him with the defendant in the action, the plaintiff was nonsuited (*r*). Where a bond had been executed and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the hearing of the defendant, was attested by another witness, who knew the defendant's hand-writing, it was held that the execution of the deed was sufficiently proved by the latter witness, since the whole might be considered as one entire transaction (*s*).

Proof on denial by subscribing witness.

Although a party is under the necessity of calling the subscribing witness (*t*), he is not concluded by the testimony of that witness, if he cannot or will not declare the truth. If the witness refuse to testify (*u*) the attestation may be proved by another witness (*x*). Where one of the witnesses to a will would not swear to the sealing and publication, Holt, C. J., held that it was sufficient to prove the attestation of the witness (*y*). If the witness admit his signature as attesting witness, but prove that he did not in fact see the instru-

(*g*) *England v. Roper*, 1 Starkie's C. 304; and see *Talbot v. Hodson*, 7 Taunt. 251.

(*r*) *Parkins v. Hawkshaw*, 2 Starkie's C. 239; B. N. P. 271. *Nelson v. Whittall*, 1 B. & A. 20. *Middleton v. Sandford*, 4 Camp. 34. But see below, p. 380.

(*s*) *Parke v. Mears*, 2 B. & P. 217. See also *Powell v. Blackett*, 1 Esp. C. 97. *A.* informs *B.* that he has executed a bond, and desires him to attest it; *B.* is a good attesting witness; *ibid.* *Secus*, if there be another attesting witness, who actually saw the deed executed. *McCraw v. Gentey*, 3 Camp. 232. *Wright v. Wakeford*, 4 Taunt. 220. Where it was agreed at a meeting of creditors that a composition-deed, when executed by the creditors present, should be void unless all the creditors executed it; and the deed was delivered to one of the creditors to get it executed by the rest, it was held that the conversation was part of the act of deli-

very, and that the delivery was but conditional as an escrow. *Johnson v. Baker*, 4 B. & A. 440. Where the attesting witness stated that a bond was delivered by the obligor as his deed, but that both before and after the delivery it was agreed that it should continue in the witness's hands until the death of *A.*, *B.* and *C.*, and that it was given to him on that condition, it was held to be a question for the jury whether it was delivered to take effect from the time of delivery, or upon a condition that it was not to operate till the death of *A.*, *B.* and *C.* *Murray v. Earl of Stair*, 2 B. & C. 82.

(*t*) *Jones v. Brewer*, 4 Taunt. 46.

(*u*) *R. v. Harringworth*, 4 M. & S. 353. *Talbot v. Hodgson*, 7 Taunt. 251.

(*x*) Per Lord Mansfield, Burr. 2224, 2225, where two of the witnesses to a will denied their handwriting, and it was proved by the third.

(*y*) *Dagwell v. Glasscock*, Skinn. 413.

ment executed, proof of the handwriting of the obligor will be sufficient (z). If the witness actually deny the due execution of the instrument, other witnesses may be called to contradict him; and circumstantial evidence is admissible to prove the contrary (a). So a will may be proved by the evidence of one witness, although two of the attesting witnesses swear that the testator was incompetent (b). And where two witnesses to a will of lands swore that the testator did not publish the will, and was incapable of doing so, the Court, upon a trial at bar, admitted witnesses to contradict them (c).

Proof on denial by subscribing witness.

In the celebrated case* of *Lowe v. Jolliffe* (d), the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, all swore that he was incapable of making a will at the time of making the will and codicil, or at any intermediate time; and yet the will was established upon the testimony of other witnesses.

Where the instrument purports to have been attested by a witness, the party on whom the proof of the instrument lies must, unless the instrument appear to be thirty years old (when it is to be inferred that the witnesses are dead), either call an attesting witness, or show that the usual proof by means of the attesting witness has become impossible. For this purpose he may prove that the attesting witness is dead (e), has become blind (f), or insane (g): That he has since the attestation been convicted of an offence, such as forgery, which renders him incompetent as a witness (h), which should be proved by the production of the record of conviction, or by means of an examined copy of it (i); and then if the conviction took place after the attestation, the handwriting of the witness should be proved (k); but if the witness was rendered infamous by a conviction previous to the attestation, it is the same as if he had not attested the deed at all: That the

Excuse for the absence of the subscribing witness.

(z) *Grellier v. Neale*, Peake's C. 47, i. e. if no other attesting witness appear on the instrument; and see *Talbot v. Hodson*, 7 Taunt. 251. *Burrows v. Lock*, 10 Ves. 474. *Lemon v. Dean*, 2 Camp. C. 636. *Fitzgerald v. Elsee*, 2 Camp. C. 635. *Ley v. Ballard*, 3 Esp. C. 173, n. *Contra*, *Phipps v. Parker*, 1 Camp. 412.

(a) And. 224, per Lord Mansfield, Doug. 206.

(b) *Diggs's case*, Skinn. 79.

(c) And committed the two witnesses for perjury, taking security from the plaintiff to prosecute them. *Hudson's case*, Skinn. 49.

(d) 1 Bl. 365; and see *Pike v. Badmering*, Str. 1096, And. 224.

(e) *Barnes v. Trompowski*, 7 T. R. 265. It seems that the ordinary presumptions as to the death of any party would be acted upon. See Vol. II., tit. DEATH—PEDIGREE.

(f) *Wood v. Drury*, Ld. Raym. 734. 12 Vin. Ab. T. b. 48, pl. 12. *Pedler v. Paige*, 1 Mood. & R. 268.

(g) Per Buller, J., 3 T. R. 712; per Ld. Kenyon, *R. v. Eriswell*, 3 T. R. 74; *Burnett v. Taylor*, 8 Ves. 381. *Currie v. Child*, 3 Camp. 283.

(h) *Jones v. Mason*, Str. 833.

(i) Ibid.

(k) Ibid.

Excuse for
the absence
of the sub-
scribing
witness.

witness was interested at the time of the attestation, which is therefore a nullity (*f*): That he has since the attestation become interested (*g*), as where he has become the administrator of the obligee (*h*), even though he disqualified himself voluntarily by taking out administration (*i*): That he has married the person to whom the instrument was given (*j*): That the witness is abroad and beyond the process of the Court, whether he be domiciled there or not (*k*), as in Ireland (*l*): That he has been kept out of the way at the instance of the adversary or party charged in the suit (*m*): That the witness cannot be found after diligent inquiry made (*n*). The nature of this inquiry may be collected from the

(*f*) 5 T. R. 371. But if a party, knowing that a witness is interested, request him to attest the instrument, he cannot afterwards insist upon the objection. *Honeywood v. Peacock*, 3 Camp. C. 196.

(*g*) *Swire v. Bell*, 5 T. R. 371. See also *Goss v. Tracy*, 2 P. W. 280. *Buckles v. Smith*, 2 Esp. C. 697. *Godfrey v. Norris*, 1 Str. 34. *Honeywood v. Peacock*, 3 Camp. 196. Where the plaintiff in an action on a charter-party had communicated an interest to a witness to the charter-party after the execution of the instrument, it was held that evidence of his handwriting was inadmissible. *Hovill v. Stephenson*, 5 Bing. 493.

(*h*) *Godfrey v. Norris*, Str. 34; 2 Ves. 112.

(*i*) Str. 34; 5 T. R. 371.

(*j*) *Buckley v. Smith*, 2 Esp. C. 697.

(*k*) *Prince v. Blackburn*, 2 East, 250. *Coghlan v. Williamson*, Doug. 93. *Holmes v. Ponten*, Peake's C. 99. *Adams v. Kerr*, 1 B. & P. 300. *Wallis v. Delancy*, 7 T. R. 266. *Ward v. Wells*, 1 Taunt. 161. *Hodnett v. Forman*, 1 Starkie's C. 80. That he went abroad two years ago, and has not been heard of since, *Doe v. Paul*, 3 C. & P. 13. One of two subscribing witnesses was dead, and the other had gone abroad twenty years before the trial, and the witness who proved the latter fact, stated that he had not heard anything of him since, but that he had applied to his brother, who informed him that he did not know where he was, whether in England or abroad. The Court held, that proof of his handwriting ought

to have been admitted; and Lord Ellenborough observed, that proof of the fact of the subscribing witness's going abroad twenty years ago (so large a portion of a man's life), and never having been heard of since, was of itself sufficient. *Doe d. Johnson v. Johnson*, K. B. Trin. T. 1818; cited 1 Phillips on Ev. 474. In *Doe v. Powell*, 7 C. & P. 617, it was proposed to show that a subscribing witness had stated where he resided; and further, to show, that upon inquiry made at that place, the answer was that he had gone to America, and then to prove in substance that some seafaring men had said that they had seen the witness in America, but the evidence was rejected.

(*l*) *Hodnett v. Forman*, 1 Starkie's C. 90; S. P. per Grose, J., Aylesbury Lent Ass. 1806; 1 Burn by Chetw. 780; see also *Burt v. Walker*, 4 B. & A. 697.

(*m*) *Pytt v. Griffith*, 6 Moore, 64. See *Doe v. Johnson*, *supra*, note (*k*). In case of evidence of inquiries made after an attesting witness, answers made even by strangers to inquiries duly prosecuted, seem in general to be admissible, to show that further inquiry would be hopeless, or that such further inquiry has been made as such answers warrant without success. Declarations made by the attesting witness previous to his departure, or letters from him since his departure, tending to show that inquiry has been properly made, or the impossibility of procuring the attendance of the witness appear also to be admissible. The evidence in such case is offered to the Judge, not to the jury.

(*n*) *Cunliffe v. Sefton*, 2 East, 183. In the case of a warrant of attorney, to

following cases. There were two witnesses to a bond which had been executed in America: it was proved that Rivington, one of the witnesses, was in America; and to show that William Moreton, the other witness, was also abroad, it was proved that a man of the name of Moreton had lived with Rivington, but it could not be proved that his name was William, or that at the time of trial he was not in England; the handwriting of the other witness was proved, and Lord Kenyon held that it was reasonable evidence to go to a jury (*o*). The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend, and the trial had been put off twice in consequence of his absence: search had also been made at the defendant's house and in the neighbourhood, and upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success; it was held, that under these circumstances, evidence of his handwriting was admissible (*p*). After inquiry at the several places of residence of the obligor and obligee, where no intelligence could be procured as to the witness, whom nobody knew, secondary evidence was held to be admissible (*q*). And it was held that it was unnecessary in such a case to advertise for the witness in the public newspapers (*r*), inquiry having been made at the only places where it was likely that the witness would be met with or heard of. Where the attesting witness had left his office of business in London twelve months before, but no inquiry had been made at the house at Sydenham, where he had resided with his family, the evidence was held to be insufficient (*s*); but on proof being given that a commission of bankrupt had been sued out against the witness a year before, to which he had not appeared, Lord Ellenborough said that

Proof in
excuse of
absence.

dispense with the deposition of the attesting witness, the nature of the search, where he had been last seen or known to reside, and when he was last heard of, must be stated. *Waring v. Bowles*, 4 Taunt. 132; and see *Crosby v. Percy*, 1 Taunt. 365. *Parker v. Hoskins*, 2 Taunt. 223. *Burt v. Walker*, 4 B. & A. 607. *Wardell v. Fernor*, 2 Camp. C. 282.

(*o*) *Wallis v. Delancy*, Sittings at Westminster, Feb. 1809, 7 T. R. 206, in the note.

(*p*) *Burt v. Walker*, 4 B. & A. 607.

(*q*) *Cunliffe v. Sefton*, 2 East, 183.

(*r*) 2 East, 183.

(*s*) *Wardell v. Fernor*, 2 Camp. 282.

And Lord Ellenborough in that case observed that the proof of search ought to be watched very narrowly. Where it was proved that the attesting witness to an agreement had been inquired after by a person who knew him, but who had not seen him for eighteen months, at coffee-houses and other places where he thought he might hear of him, at the request of the plaintiff's attorney, and without success, it was held that proof of the handwriting was admissible, without proof that inquiry had been made of the parties to the suit, who had executed the agreement. *Evans v. Curtis*, 2 C. & P. 206.

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he would presume that he was out of the kingdom, and that if he had been at Sydenham he would have surrendered to save himself from a capital felony (*t*). Where inquiry had been made after the witness at the Admiralty, and it appeared from the last report that he was serving on board some ship, but it did not appear what ship, it was held to be sufficient (*u*). So it was where inquiry had been made at the last place of residence of the witness, and the answer from his father was, that he had absconded to avoid his creditors, and was not to be found (*x*). In another case the testimony of the subscribing witness was dispensed with on evidence given that the witness had expressed his intention to leave the country, stating that he had reason for doing so, in order to avoid a criminal charge, and that his relations had not seen him after his expression of such intention (*z*). A fortnight before the trial inquiry was made in vain from the clerk and agent of the attesting witness, and five or six days before the trial inquiry was made from his wife and servant at his house, who could give no information; a bailiff, from whom he had escaped, stated that he had searched for him without effect; it was held to be sufficient (*a*). If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact the vessel may have been unexpectedly beaten back into an English port by contrary winds at the time of trial (*b*).

It seems that the temporary illness of an instrumentary witness would not be a sufficient ground for admitting secondary evidence (*c*).

Where the plaintiff, in order to prove his possession of a house, proposed to prove receipts for taxes given by the tax-gatherer, who had attended under a *subpœna* to give evidence, but had been seized with an apoplectic fit, and taken home dangerously ill before the trial came on, and it was proved that he was *in extremis*, the secondary evidence was rejected (*d*).

(*t*) 2 Camp. C. 282; and see 12 Mod. 607.

(*a*) *Parker v. Hoskins*, 2 Taunt. 223.

(*x*) *Crosby v. Percy*, 1 Taunt. 365.

Where the father of the witness proved his having enlisted in a regiment, which, upon inquiry at the War-office, he was told had sailed for India; held sufficient to let in proof of his handwriting. *Wyatt v. Bateman*, 7 C. & P. 586. An inquiry of the servant at the premises, held a sufficient inquiry to let in evidence of the witness's handwriting, and that it is not necessary to show that he is kept out of

the way by collusion. *Willman v. Worrall*, 8 C. & P. 380. *Semble*, where grounds are shown for suspecting that he is purposely kept out of the way, proof of stricter search is requisite.

(*z*) *Kay v. Brockman*, 3 C. & P. 555.

(*n*) *Morgan v. Morgan*, 9 Bing. 359.

(*b*) *Ward v. Wells*, 1 Taunt. 461.

(*c*) A trial at the assizes may be put off on an affidavit stating the illness of such a witness.

(*d*) By Lord Ellenborough, *Harrison v. Blades*, 3 Camp. C. 457. Mansfield, C. J.,

The party may also prove that the name of a person as attesting witness was introduced as such without the knowledge or assent of the parties; for in that case he is not an attesting witness (e), or that the name was merely fictitious (f). But it is no excuse to show that the witness has denied his attestation, without calling him (g).

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absence.

Where there is more than one attesting witness, and the absence of all but one is accounted for, the case seems to be the same as if the latter had been the only attesting witness, and he must be called to prove the execution, and no other evidence can supply the place of his testimony.

Where there have been sufficient attesting witnesses, whose absence is satisfactorily accounted for, the proper proof is by giving evidence of the handwriting of the attesting witnesses; and it has been usual in such cases to give evidence also of the handwriting of the obligor (h). This however does not appear to be necessary (i). The signature of an attesting witness, when proved, is evidence of every thing upon the face of the instrument, for it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place; and where there are several attesting witnesses, all of whom are accounted for, proof of the handwriting of any one is sufficient, without proving that of the rest (k). It has been held, indeed, in some instances, that where the testimony of the attesting witnesses cannot be had, owing to their death, absence, interest, or any other disqualification accruing subsequently to the attestation, the signature of the party, as well as the witness (l), must be proved; and, in many instances, an admission by the obligor (m) of the debt, or

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in *Jones v. Brewer*, 4 Taunt. 40, says, "perhaps in some instances of sickness" the handwriting of a subscribing witness may be proved. See *Doe v. Evans*, 3 C. & P. 221.

(e) 4 Taunt. 220. *M'Craw v. Gentry*, 3 Camp. 232.

(f) *Fasset v. Brown*, Peake's C. 23.

(g) *Jones v. Brewer*, 4 Taunt. 46. And 235. See *Talbot v. Hodgson*, 7 Taunt. 251. *Fitzgerald v. Elsee*, 2 Camp. 635. *Lemon v. Dean*, 2 Camp. 636, n. *Grelhier v. Neale*, Peake's C. 145. *Ley v. Ballard*, 3 Esp. C. 173. *Boxer v. Robeth*, Gow. 175. Contra, *Phippes v. Parker*, 1 Camp. 412.

(h) 1 B. & P. 360; 2 East, 183. 250; 2 Str. 833; 1 Str. 34.

(i) *Kay v. Brookman*, 7 C. & P. 556.

(k) 1 B. & P. 300. *Gough v. Cecil*, 1 Sel. 516, n. *Cumtiffe v. Sefton*, 2 East, 183. *Prince v. Blackburne*, ib. 240. But in *Hill v. Unett*, 3 Madd. 370, it is said, that if the witness be alive, proof must be given of the handwriting of the obligor. In such case, a parol acknowledgment will not be sufficient to dispense with evidence of the handwriting. Ibid.

(l) 7 T. R. 200. *Wallis v. Delancy*, 7 T. R. 286, n. *Coghlan v. Williamson*, Doug. 80. 93.

(m) Doug. 80. 93; 2 East, 183. In an action on a promissory note, the subscribing witness being dead, proof of his handwriting, and that the defendant was present when the note was prepared, is sufficient,

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of the execution of the deed, has been given in evidence. It seems, however, to be now perfectly settled, for the reason already given, that evidence of the signature of one of the attesting witnesses alone is sufficient (*n*); as in the case of *Adams v. Kerr* (*o*), where it was proved, that one witness was dead, and that the other was in Jamaica, and proof of the handwriting of the deceased witness was held to be sufficient, without proof of the handwriting of the other witness, or of the obligor. Some doubt, however, has existed upon the question, whether in such cases proof of the handwriting of the witness was sufficient, he being dead, without any further proof of the identity of the parties, except that of similarity of name and description. Lord Tenterden acted on the opinion, that no further evidence was necessary (*p*). But in the case of *Whitelock v. Musgrove* (*q*) evidence of identity was held to be necessary.

without proving the handwriting of the defendant. *Nelson v. Whittall*, 1 B. & A. 19. But see *Page v. Mann*, 1 M. & M. 79. Where it was proved that the attesting witness had gone abroad two years ago, and it was not known what had become of him since, and the defendant had been heard to say he had sixteen years to come of the term granted by the lease, held that proof of the subscribing witness's handwriting was sufficient, though the party executing the deed was a marksman. *Doe d. Wheelton v. Paul*, 3 C. & P. 613. Where the attesting witness cannot be produced, proof of his handwriting is sufficient evidence of execution by the obligor, although only a marksman. *Mitchell v. Johnson*, 1 M. & M. 176. Where the subscribing witness to the deed of proprietors constituting a company, was beyond seas, held that proof of his handwriting was sufficient, without further proof of the handwriting or identity of the parties. *Kay v. Brookman*, 1 M. & M. 286; and 3 C. & P. 555, overruling *Nelson v. Whittall*, 1 B. & A. 19.

(*n*) *Adams v. Kerr*, 1 B. & P. 360. *Prince v. Blackburne*, 2 East, 250. *Milward v. Temple*, 1 Camp. 375. *Gough v. Cecil*, 1 Sel. N. P. 516. It is however frequently desirable to give evidence of the handwriting of the obligor, for the purpose of proving his identity, some evidence of which seems to be in all cases necessary. See *Parkins v. Hawckshaw*, 2 Starkie's C. 239, *supra*, 374. And see *Nelson v. Whittall*,

1 B. & A. 19. *Middleton v. Sandford*, 4 Camp. 24. *Mancot v. Bates*, B. N. P. 171.

(*o*) 1 B. & P. 360. *Prince v. Blackburne*, 2 East, 250. But see *Hill v. Unett*, 3 Maddox, 370, where the distinction is taken between the case where a witness is dead, and that where he is still living; in the latter case it was held, that proof of the handwriting of the obligor was necessary.

(*p*) *Page v. Mann*, 1 M. & M. 79, cor. Lord Tenterden, C. J. Notwithstanding the doubt expressed by Bayley, J., in *Nelson v. Whittall*, 1 B. & A. 21, referring to the opinion of Lord Kenyon, in *Wallis v. Delaney*, 7 Tr. 266, n., that the handwriting of the obligor of a bond in such case ought to be proved. See also *Doe d. Wheelton v. Paul*, 3 C. & P. 13. *Kay v. Brookman*, 1 M. & M. 286; 3 C. & P. 555. *Mitchell v. Johnson*, 1 M. & M. 176.

(*q*) 1 Cr. & M. 521. That was the case of an action on a promissory note made by a marksman. Slight evidence of identity appears, however, to be sufficient. *Nelson v. Whittall*, 1 B. & A. 19. *Gough v. Cecil*, Sel. N. P. 516. And although proof of the parties' signature would usually be the most satisfactory evidence of identity, such evidence does not, according to the case of *Whitelock v. Musgrove*, 1 C. & M. 511; 3 Tye. 541, appear to be necessary. Proof that the defendant was present when the instrument was executed, that he resided

Where one of the attesting witnesses, after diligent inquiry made, could not be found, and the other had become interested since the attestation, it was held, that evidence of the handwriting of the latter witness was sufficient proof (*r*). So where the witness since the attestation had been convicted of forgery (*t*). Where one of two witnesses was dead, and the other denied his signature, Lord Holt admitted evidence of the handwriting of the former (*u*). By the 20 Geo. 3, c. 57, s. 38, as to deeds executed in the East Indies, and attested by witnesses resident there, it is sufficient to prove by one witness the handwriting of the parties and of the witnesses, and that the latter are resident in India. These provisions seem to have been superseded by the rules of evidence already stated.

Secondary proof in the absence of the attesting witness.

Where it appears that one or more of those whose names appear on the face of the instrument to be attesting witnesses, never were so in fact; as where, upon being called, they prove that they never did attest the execution of the instrument; or where they were incompetent at the time of its execution to attest it, either from being interested, or from infamy of character, the effect seems to be the same as if their names had not appeared at all on the face of the instrument (*x*). In such case, if there be other attesting witnesses they must be called, or their absence accounted for, and their handwriting proved in the manner already stated.

If the deed, or other instrument, when produced, appear to be *thirty years* old, no further proof is required; since after that time it is to be presumed that the attesting witnesses are all dead (*y*). And it seems to be clearly established, that this is not a mere

Proof of, when thirty years old.

at the place, or any other circumstance, or observations made by him tending to prove identity, would be admissible for the purpose. *Ibid.* And see *Nelson v. Whittall*, 1 B. & A. 19. *Gough v. Cecil*, cited Sel. N. P. 516, n.

(*r*) *Cuntiffe v. Sefton*, 2 East, 183. In this case there was also proof of the acknowledgment of the debt. See also 1 Str. 34; 1 P. W. 289. *Swire v. Bell*, 5 T. R. 372.

(*t*) *Jones v. Mason*, Str. 833.

(*u*) *Burton v. Toon*, Skinn. 639.

(*x*) *Vid. supra*, 375. The attesting witness to a bond declared that he did not see it executed by the obligor; held that it was the same as if there had appeared to be no attesting witness, and that the execution was sufficiently proved by showing the handwriting of the obligor. *Bozer v. Rabeth*, 1 Gow's C. 175.

(*y*) B. N. P. 255; Bac. Ab. Ev. F. 647;

Tri. P. P. 339. 346; Co. Litt. 6. *Doe d. Spilsbury v. Burdett*, 4 A. & E. 19; 2 T. R. 471. *Doe v. Walley*, 5 B. & C. 24. So in case of a will thirty years old, reckoning from the time of execution. See WILL, and *Doe v. Walley*, 5 B. & C. 22. *Miller v. Miller*, 2 Bing. N. C. 70. And Vol. II. tit. WILL. The rule applies generally to deeds concerning lands, bonds, and other specialties. *Governor of Chelsea Waterworks v. Cowper*, 1 Esp. C. 275. Entries in stewards' books. *Wynne v. Tyrrichitt*, 4 B. & A. 376. Letters and other written documents. *Ib.* For the rule is founded on the antiquity of the instrument, and the great difficulty, nay the impossibility, of proving the handwriting after such a lapse of time. See *R. v. Ryton*, 5 T. R. 229. *Fry v. Wood*, Sel. N. P. 535. *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44. *Munley v.*

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primâ facie presumption that the witnesses are dead, which is liable to be rebutted by proof that the attesting witnesses are still alive, so as to render it necessary to call them: but that it is a peremptory rule of law, founded upon general convenience, that such proof, after a lapse of thirty years, shall be unnecessary (z). Where, however, the deed labours under any suspicion, arising from any *rasure* or *interlineation*, it is a matter of prudence and discretion to prove it in the usual way by means of an attesting witness, if any be still living, or by proof of the handwriting of an attesting witness, where they are all dead (a), in order to rebut the unfavourable presumption arising from an inspection of the deed; and

Curtis, 1 Price, 232. *Bertie v. Beaumont*, 2 Price, 308. Where a letter, dated in 1748, was found in the possession of the representative of the defendant's attorney, it was held to be *primâ facie* evidence to prove that the letter had been written to him, although it was without address, the envelope having been lost. *Benwick v. Reed*, 6 Mad. 8. It was also held, in the same case, that a letter found among his papers, and appearing, from its contents, to have been written by the attorney's London agent, was admissible in evidence. *Ibid.* In *Beer v. Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title-deeds kept at the family seat, was admitted without proof of the handwriting, by Dallas, C. J., Mich. 1821, and by Lord Tenterden, 1823. In favour of an ancient certificate, recognised by the certifying parish, it will be presumed that the churchwarden who executed the certificate, was duly sworn. *R. v. Whitchurch Inh.*, 7 B. & C. 573. *Marsh v. Colnett*, 2 Esp. C. 605. And see *R. v. Farrington*, 2 T. R. 466. *Mackey v. Newbolt*, 4 T. R. 709. In the case of *The King v. Netherthong*, 2 M. & S. 397, it was held, that a certificate by the appellant parish (80 years old), might be read in evidence when produced by a rated inhabitant of the respondent parish, without any account given of its custody; and the Court intimated that he might, if necessary, be examined by the appellants as to the custody. A bond, 30 years old, found amongst the papers of a corporation, who were the

obligees, is admissible without proof of the handwriting of the obligor or attesting witness. *The Governor and Company of the Chelsea Waterworks v. Cowper*, 1 Esp. C. 275. *Rees v. Mansell*, Selw. N. P. 517. On a question, whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases, kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff claiming under the lord of the manor, though possession under the leases was not shown. *Clarkson v. Woodhouse*, 5 T. R. 412, n.

(z) *Doe v. Walley*, 5 B. & C. 24. Lord Tenterden, C. J., in that case observed, that the allowing the presumption of the death of the attesting witness to be rebutted, would be but a trap for a nonsuit. And see B. N. P. 255. *Marsh v. Colnett*, 2 Esp. C. 605. In *Rees v. Maxwell*, Sel. N. P. 402, Baron Perrott is stated to have ruled to the contrary, on the ground that the lapse of time afforded mere presumptive evidence of the death of witnesses. But another case was cited to Mr. B. Perrott upon that occasion, in which Mr. J. Yates, for the sake of the practice, would not allow a witness to prove an old deed, although he attended for the purpose. And see *Doe v. Burdett*, 4 Ad. & Ell. 1. In the Law of Evidence, 2d edit. 105, 40 years is stated as the age when a deed becomes admissible without the usual proof.

(a) *Chettle v. Pound*, B. N. P. 255; Bac. Ab. Ev. F. 648.

this ought more especially to be done if the deed import fraud; as where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title; because in such case, the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud (*b*). The same rule applies to other old writings, such as receipts (*c*) and letters (*d*). Where an indenture of apprenticeship had been executed thirty years ago, and the parish in which the pauper had resided had treated him as a parishioner for twelve years, it was presumed that the indenture had been lost, and that it had been properly stamped, although it was proved by the deputy registrar and comptroller of the apprentice duties, that it did not appear to have been stamped with a premium-stamp from 1773 to 1805 (*e*).

Proof of instrument thirty years old.

It has been said, that where an old deed is given in evidence, without proof of its execution, some account ought to be given of the place where it has been kept (*f*); or evidence should be given so as to afford a presumption that the party has been in possession under the deed (*g*). In ordinary cases, however, where the instrument is produced by one who has an interest in it, it is not necessary to show where the instrument has been kept; it is sufficient to produce a parish certificate thirty years old, without showing whence it came (*h*). So it was held to be sufficient for a rated inhabitant of a respondent parish, to produce a certificate above thirty years old, by the appellat parish (*i*).

It has already been observed, that in order to give authenticity to an ancient instrument which does not admit of proof by the

Proof as to the custody of ancient documents.

(*b*) B. N. P. 255; Bac. Ab. Ev. 648.

(*c*) *Bertie v. Beaumont*, 2 Price, 308. *Buller v. Michell*, 2 Price, 309; 4 Dow. 297. *Wynne v. Tyrwhitt*, 4 B. & Ald. 376. *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44. *Martin v. Curtis*, 1 Price, 232.

(*d*) In *Beer v. Ward*, cor. Dallas, C. J., Sitt. after Mich. 1821: and cor. Ld. Tenterden, C. J., K. B. Sitt. after Trin. 1823, on an issue as to the legitimacy of A. B., an old letter, purporting to be signed by the head of the family, and brought from among the title-deeds at the family seat, was admitted to be read.

(*e*) *R. v. Long Buckby*, 7 East, 45. The binding being in the year 1774 or 1775.

(*f*) B. N. P. 255. 648.

(*g*) Bac. Ab. Ev. F. 644; B. N. P. 254.

As to such writings, some evidence should be given as affords a reasonable presumption that they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty. Vin. Ab. tit. Evidence, A. 6; 7 East, 291; 4 B. & A. 376; B. N. P. 255. *Forbes v. Wale*, 1 Bl. 532.

(*h*) *R. v. Rytton*, 2 T. R. 259. See also *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44. *Fry v. Wood*, Sel. N. P. 535.

(*i*) *R. v. Netherthong*, 2 M. & S. 387. Lord Ellenborough, C. J., intimated that the rated inhabitant being brought forward as the mere depositary of the instrument, if the party objecting wished to inquire into the custody, he might. This was before the stat. 54 Geo. 3, c. 170, which made rated inhabitants competent.

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ordinary tests (*k*), it is essential to show that it has been brought from the natural and legitimate repository (*l*); as in the case of terriers (*m*), ancient grants (*n*), an inspeximus (*o*), an endowment by a bishop (*p*).

Upon the trial of an issue to ascertain the boundary between two parishes, where a box containing old terriers and other parish documents was produced, proof that they had been received from the son of the last rector of the parish, and had been transferred to the plaintiff, the present incumbent, was held to be sufficient evidence as to their custody (*q*). Where, however, a book which purported to be the book of a former rector, came out of the hands of the defendant, being the grandson of the former rector, the proof of custody was held to be insufficient (*r*). In the case of *Michell v. Rabbetts* (*s*), a grant to an abbey, contained in a manuscript entitled "*Secretum Abbatis*," in the Bodleian Library at Oxford, was rejected as not coming from the proper custody; and for the same reason an old grant of a priory, brought from the Cottonian Manuscripts in the British Museum, was also rejected, for want of showing that the possession of the grant was connected with any person who had an interest in the estate (*t*). Where a writing, purporting to be an endowment of a vicarage, and another purporting to be an inspeximus of the former, under the seal of the Bishop of Norwich, had been purchased at a sale, as part of a private collection of manuscripts, it was held, that coming out of the custody of a private person, unconnected with the matters contained in them, they were inadmissible (*u*). But in a tithe-suit, a book which purported to be the book of a former collector of tithes, and seventy years old, in the hands of the successor to such collector, was admitted (*x*).

In the case of *The Bishop of Meuth v. The Marquis of Winchester*, it was held (*in quare impedit*) that a case stated by a former bishop for the opinion of counsel, and preserved with his private papers and family documents, was admissible. For although the

(*k*) *Supra*, 230, 240; and see 1 Esp. C. 278. *Forbes v. Wale*, 1 Bl. 532; and Vin. Ab. Ev. A. b. 5.

(*l*) *Supra*, 240; as to ancient licenses by a lord of a manor to fish, 340; to prove a right in the lord to places within the manor cleared of turbary, *ibid.*; and *Clarkson v. Woodhouse*, 5 Tr. 412.

(*m*) *Supra*, 230, 240.

(*n*) *Ib.* Grants of abbey lands should be shown to be in the possession of those connected with the estate. *Lygon v.*

Strutt, 2 Anst. 601. And see *Buller v. Michell*, 2 Price, 405.

(*o*) *Supra*, 230, 240.

(*p*) *Ib.*

(*q*) *Earl v. Lewis*, 4 Esp. C. 1.

(*r*) *Randolph v. Gordon*, 5 Price, 512.

(*s*) 3 Taunt. 91.

(*t*) *Swinnerton v. Marquis of Stafford*, 3 Taunt. 71.

(*u*) *Potts v. Durant*, 3 Ans. 789.

(*x*) *Jones v Walker*, 3 Gwill. 117.

document in some respects related to the see, it might more reasonably be expected to be found among the bishop's private papers and family documents than in the public registry of the diocese (y).

Where the defendant in a suit by the rector for tithe, offered in evidence a paper purporting to be a receipt given by a former rector, to a person of the same name with the defendant, forty-five years ago, it was held to be admissible, without proof of the handwriting of the rector, and without any proof as to the custody further than that it came out of the hands of the defendant; for none but an occupier could have acquired such a receipt (z). But where Curtis, the defendant in a similar suit, produced a paper purporting to be a receipt from Smith to one Curtis fifty years ago, but there was no evidence to show who Smith was, or where the paper had been kept, the evidence was rejected (a).

In the case of *Bullen v. Michell* (b), the question was between a vicar and occupier, whether a farm modus had existed immemorially; and after proof that search had been made in the proper registries for the original endowment of the vicarage by the abbey of Glastonbury, it was held, that a book purporting to be the ledger-book and chartulary of that abbey, and preserved amongst the muniments of the Marquis of Bath, the owner of some estates which formerly belonged to the abbey, although not of the farm in question, was sufficiently connected with the abbey as to be admissible in evidence as a genuine document which had belonged to the abbey (c). It was also held, that two documents contained in the book were evidence; the one being in the form of an appropriation, dated 1269, made by the Bishop of Salisbury to the abbey of Glastonbury, of the profits of a rectory,

(y) 3 Bing. N. C. 203. It appeared upon the evidence there was only one ecclesiastical record preserved in the registry of the diocese of so early a date, whilst on the other hand the document was found in the same parcel with several papers belonging to the see, and in the same room several visitation books of the diocese, and other papers relating to the same. For the very learned and elaborate judgment of Tindal, C. J., in the above case, see the Appendix.

(z) *Bertie v. Beaumont*, 2 Price, 303.

(a) *Manby v. Curtis*, 1 Price, 225. Wood, B. dissent.

(b) In D. P., 2 Price, 299, *supra*.

(c) It was observed by Gibbs, C. B. 2 Price, 410, that such a book as this pur-

ports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown, and the Crown afterwards granted them to different persons. The book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go to one only of those grantees, and the only possible way of connecting it with the abbey is by showing a connection between the possessor and the Crown, and by raising a probability that the Crown may have handed over the book to its present possessor.

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reserving to the bishop a power of ordaining a vicarage in the same church, of a specified yearly value, and the other containing a list of different articles of endowment of the said vicarage (*d*). It was also held, that the accounts of the rents of the abbey, also found among the same muniments, and containing the allowances and acquittances of the abbey, were admissible. Copies from an ancient schedule, produced from the muniments of a corporation, and delivered to the toll collectors, by which they collected the tolls, are admissible for the corporation, although it would have been otherwise if not shown to have been delivered to the collectors by the corporation, however accurately corresponding (*e*).

In some instances the party who offers the instrument in evidence is the proper depository, and then no proof of custody is necessary, as where, in a settlement case, a litigant parish produces a certificate, above thirty years old, granted to them (*f*).

Proof
where there
is no attest-
ing witness.

Where no name of any attesting witness is subscribed, or where there are names subscribed which are proved to be fictitious (*g*), or of real persons who either did not actually witness the execution of the deed or other instrument (*h*), or who were in point of law incompetent to attest it (*i*), the execution may be proved by the testimony of any witness who was present when the deed was executed (*k*)*; or it will be sufficient to prove the handwriting of the obligor, from which the sealing and delivery may be presumed (*l*), or his acknowledgment of the instrument.

(*d*) Wood, B. dissented from the other Judges of the Court upon this point: he admitted that the book had been sufficiently connected with the abbey to make it evidence as a copy of the endowment, supposing such evidence to be relevant; but he was of opinion that it was not relevant evidence upon that point, since the endowment was not disputed; and that for any other purpose these entries were *res inter alios*, and mere memorandums of an executory project. See his observations at length, 2 Price, 425.

(*e*) *Brett v. Beales*, 1 M. & M. 417.

(*f*) *R. v. Ryton*, 5 T. R. 259. In such a case it is sufficient if the certificate is produced by a rated inhabitant of the parish. *R. v. Netherthong*, 2 M. & S. 337. So it is sufficient that a corporation produce corporation documents. 2 M. & S. 338.

(*g*) *Fassett v. Browne*, Peake's C. 23.

(*h*) *Grellier v. Neale*, Peake's C. 146. *M'Crav v. Gentry*, 3 Camp. 232; 4 Taunt. 220. In the case of *Phipps v. Parker*, 1 Camp. 412, where the party whose name appeared as the attesting witness negatived the attestation by him, Lord Ellenborough held, that the deed could not be proved by evidence of the handwriting of the supposed obligee, or of an acknowledgment by him; but this case is overruled by subsequent authorities. *Fitzgerald v. Elsee*, 2 Camp. 635, cor. Lawrence, J. *Lemon v. Dean*, 1b. 636, cor. Le Blanc, J.

(*i*) Com. Dig. Ev. B. 3.

(*k*) Ibid. *Fitzgerald v. Elsee*, 2 Camp. 635. *Lemon v. Dean*, 2 Camp. 636.

(*l*) Com. Dig. Fait, B. 4, 1 Lev. 25. *Fassett v. Browne*, Peake's C. 23; 2 T. R. 41. *Grellier v. Neale*, Peake's C. 146. *Talbot v. Hodgson*, 7 Taunt. 251; the subscribing witness having denied that he saw the execution, a co-obligor having been released, swore that

Where the deed has been lost (*m*) or destroyed, the fact must be proved; if positive proof of the destruction cannot be had, it must be shown that a *bonâ fide* and diligent search has been made for it in vain where it was likely to be found (*n*). Proof of in case of loss.

The degree of diligence to be used in searching for a deed must depend on the importance of the deed and the particular circumstance of each case (*o*).

It is not absolutely necessary that the search for the original document should be made for the purpose of, and shortly before the cause: where it had been made recently after the death of the party in whose possession it had been, although three years before the action, it was held to be sufficient to let in the secondary evidence (*p*).

Inquiry was made after an indenture of apprenticeship at the house of the deceased master ten years after his death, in which house his son and widow still resided, and his goods and effects remained, and the son said that he could not find it, and some parol evidence was given to show that a deed of apprenticeship existed; the Court held that the proof of binding was not sufficient (*q*). Where there were two parts of an indenture of apprenticeship, one which was proved to have been destroyed, and the other had been delivered to Miss Taylor, of Bomford, to whom the apprentice had been assigned; evidence was given that application had been made to Miss Taylor, who had ceased to reside at Bomford, for the part delivered to her, and that she had said that she could not find it, and did not know where it was, but Miss Taylor, though still living, was not called as a witness, the Court held, that

there was a seal on the bond when the defendant wrote his name opposite, but that the defendant did not seal it, nor put his hand to the seal, or deliver it in the witness's presence. The jury, on the evidence being left to them, found for the plaintiff; and the Court afterwards held that this had been properly left to the jury. For proof of handwriting, see tit. HAND-WRITING, Vol. II.

(*m*) A document sent abroad and negotiated by the defendant on the plaintiff's account, may be considered as a lost bill. *Hunt v. Alewyn*, 1 M. & R. 433.

(*n*) *Goodier v. Lake*, 1 Atk. 446. *Lord Peterborough v. Mordaunt*, 1 Mod. 94. Where after a lapse of thirty-six years since the indentures were executed, and which had been long since *functi officio*,

it was shown that every person had been applied to and called, in whose possession they might reasonably be expected to be found; held, that it was such due diligence as entitled the secondary evidence to be let in. *R. v. Earl Furlough*, 6 D. & R. 146.

(*o*) Per Best, C. J., in *Gully v. The Bishop of Exeter*, 4 Bing. 298.

(*p*) *Fitz v. Robbets*, 2 Mood. & R. 60.

(*q*) *R. v. St. Helens in Abingdon*, B. S. C. 292. 375; 2 Bott. 449; but in this case the evidence seems to have been insufficient to prove a binding, independently of the objection, that the proof of loss was insufficient for the purpose of admitting secondary evidence; and the circumstances of the case rather negatived the existence of a valid indenture.

Proof in
case of loss.

the part so delivered had not been sufficiently accounted for; it had been traced into the hands of Miss Taylor, but no further evidence had been given to show what had become of it (q). But where one part only of an indenture of apprenticeship had been executed, and both the pauper and master were dead at the time of the trial, and it appeared on the evidence, that on inquiry made from the pauper shortly before his death, he said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it; and inquiry had also been made of the daughter and executrix of the master, who said that she knew nothing about it, and no further search was made, the Court held the proof to be sufficient, since here, if the declaration of the pauper was admissible so as to show a possession by him, it also showed that further search was unnecessary; and on this ground it was distinguished from the case of *The King v. Castleton*, for there the evidence showed that a further search was necessary (r).

Evidence of
search.

The master of an apprentice having the indentures in his possession failed; an attorney took the management of his estate and the custody of his papers, which he inspected without finding the deed; this was held to be sufficient evidence of loss, though the widow was still living, and no inquiry had been made from her: such an inquiry would have been useless after such evidence as to the master's papers (s). But where on an appeal against an order of removal the appellants relying on a settlement of a person deceased by apprenticeship, called the widow of the deceased, who proved that her husband, in his last illness, told her that he had received the indentures from his master at the end of the apprenticeship, and had worn them out in his pocket, it was held that without further

(q) *R. v. Castleton*, 6 T. R. 236. See also *Williams v. Younghusband*, 1 Starkie's C. 139.

(r) *R. v. Morton*, 4 M. & S. 48. The Court of King's Bench held that in such a case it was sufficient for the parties to show that they had used reasonable diligence; that these were terms applicable to some known or probable place or person in respect of which diligence may be used; that what the pauper said was admissible, and although it might not amount to proof of the fact that the indenture had been destroyed by him, it was so far evidence as to afford a reason why further search was not made with him. That if such an inquiry had been made of a merchant for some commercial purpose, and he had

given a similar answer, it would have been sufficient. It was like a non-production on request, and the party accounts for it; and that this was distinguishable from the case of *R. v. Castleton*, for there the answer given was a reason for making further search.—Where a person to whom letters had been written which were required to be produced, said that he had searched for them in a particular box in which he had put them, without being able to find them, but added that he thought they were somewhere in his possession, but that he had not searched in any other place, it was held that enough had not been done to let in secondary evidence. *Bligh v. Wellesley*, 2 Carr. & P. C. 400.

(s) *R. v. Piddlehinton*, 3 B. & Ad. 460.

inquiry evidence of the conversation was inadmissible. And the case was distinguished from that of *Rex v. Morton* on the ground that in that case inquiry had been made from the master's executrix (*t*). Evidence of search.

In the case of a parish apprentice, after reasonable proof has been given of a delivery of the indenture to the parish officers, proof should be given of a search in the parish chest, which is the proper place of deposit (*u*).

An agreement for a lease had been deposited in the hands of the landlord, who, upon application to him by the lessee, refused to produce it; ten years after this, and three after the death of the lessor, the tenant, upon an appeal, swore that he did not know in whose possession the agreement was, and no inquiry had been made after it; and yet it appears that parol evidence was held to be admissible (*x*); and Buller, J. observed, that if it had been in proof that the executor of the lessor had been in possession of the instrument, it might have varied the case. After the expiration of the lease, the lessee, the pauper, was entitled to it in strictness, but he neither had it, nor knew whether it existed; and it was then nine years after its expiration (*y*). But in general it must be shown that inquiry has been made after the deed (*z*), and the loss of it

(*t*) *R. v. Rawden*, 1 A. & E. 156. The Court observed, that the evidence was of a dangerous kind, and to be received with caution.

(*u*) Where the mother of a parish pauper stated that she had received money from the officers of *B.* to put her son out as an apprentice; that she accordingly put him out, and delivered the indenture to the wife of a market gardener, who was dead, having survived her husband, to be delivered to the overseers of *B.* and that search had been made in the parish chest of *B.* for the indenture without success; it was held that parol evidence was admissible, the parish chest being the proper place of deposit. *R. v. Stourbridge*, 8 B. & C. 96. *M'Gahey v. Alston*, 2 M. & W. 214, *infra*. So where search has been made in the parish chest of the binding parish for the indenture, which had been proved to have been delivered to N. Badger, the mother of the apprentice, to be delivered to the overseer, and the husband being dead, his executor was called to negative the existence of any such instrument among his papers. *R. v. Bromsgrove*,

East. T. 1828.—Where the indentures were proved to have been delivered by a parish apprentice to his master, who was still living, it was held that the master's declaration, on application by the apprentice at the end of the term, that he had delivered the indenture to the parish officer, was not admissible to let in parol evidence of the contents; and proof that a fruitless search had been made among the papers of the parish for the indenture, was held to be insufficient to let in parol evidence. *R. v. Dennis Inh.* 7 B. & C. 620. *R. v. Castleton*, 6 T. R. 236, cited by Bayley, J. as directly in point; and see *Williams v. Younghusband*, 1 Starkie's C. 139.

(*x*) *R. v. North Bedburn*, Caldecot, 452.

(*y*) *Qu.* whether, inasmuch as the document had been proved to be once in the possession of the lessor, who had refused to deliver it up, a presumption did not arise that it was in the hands of the representative? In fact no inquiry had been made after the deed, and there was no proof that it was not still in existence.

(*z*) *R. v. St. Sepulchre*, 2 Bott. 362. Nolan, P. L. 465.

Evidence of search. must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced (*a*), if that person be living; and if he be dead, application should be made to his representative, and search should be made amongst the documents of the deceased.

Where the appointment of overseers for the year 1802 could not be found in the parish chest, and search had been made among the papers of *B.* deceased, who had acted as executor of the party who acted as overseer for that year; it was held to be sufficient to let in parol evidence of the contents of that appointment, as being of a single overseer for that year (*b*).

Where the publisher of a weekly paper, upon an indictment for a libel, swore that he believed that the original had been destroyed, it was held to be sufficient proof to let in secondary evidence (*c*). Where a licence to trade with an enemy, granted by a governor of a colony, had been returned after being used, to the secretary of the governor, who swore that it was his custom to put aside such licences amongst the waste papers in the office, as being of no further use; that he supposed that he had disposed of the licence in question in this manner; and that he had searched for it, but did not recollect whether he had found it or not, though he did not think that he had found it; the Court were of opinion that the evidence satisfied what the law required in respect of search, and established, with reasonable certainty, the fact of the licence being lost. It was not, the Court observed, to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention was not particularly drawn at the time, on account of any importance being supposed to belong to it (*d*). Where a loss had been settled upon a policy of insurance against fire, in the year 1813, and upon a trial in 1819, the plaintiff, in an action for libel, charging him with having made fraudulent claims upon the insurance company with respect to such loss, called their agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterwards, when the plaintiff made a larger insurance with the company, that upon the loss having been

(*a*) *R. v. Castleton*, 6 T. R. 236. Where policies of insurance had been delivered to the assignees of a bankrupt, one of whom was since dead, proof of an application to the solicitor under the commission, who answered, that he did not know what was become of them, was held to be insufficient. *Williams v. Younghusband*, 1 Starkie's C. 139.

(*b*) *R. v. Witherby*, 4 M. & Ry. 725.

(*c*) *R. v. Johnston*, 7 East, 65. 339. It may be presumed that an useless instrument has been destroyed. See the observations of Bayley, J. in *R. v. Farleigh*, 6 D. & R. 153. See also *Kensington v. Inglis*, 8 East, 273, *infra*.

(*d*) *Kensington v. Inglis*, 8 East, 273.

settled, the old policy became an useless paper, that he did not know what had become of it, but he believed he had returned it to the plaintiff; the clerk to the plaintiff's attorney then proved, that within a few days of the trial he went to the plaintiff's house to search for the policy, when the plaintiff showed every drawer where he usually kept his papers, that he examined such drawers, and every other place he thought it likely to find such a paper, without finding it. Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy (e).

Evidence of search.

A check having been drawn on account of a parish, was delivered to the paying clerk of the parish, the bankers of the parish on the same day paid a sum of the same amount; the course was to return the cancelled check to the paying clerk to be deposited in an apartment of the workhouse. The paying clerk having gone out of office, application had been made (by a witness called) to his successor for an inspection of the checks, he handed to the witness several bundles which were searched unsuccessfully for the checks in question, it was held that secondary evidence was admissible (f).

Where it appeared that the magistrate who took the informations had returned them to the clerk of the peace, and the clerk to the latter stated that it was the practice where bills had been ignored to throw away the papers as useless, and that after searching, the informations could not be found; it was held, in an action for a malicious prosecution, that this was sufficient to let in secondary evidence of their contents, without calling the clerk of the peace to show they were not in his possession: for if the information was delivered to the deputy, it was delivered to him as the agent of the clerk of the peace, and not for his own purposes; it was therefore to be presumed that the document was not among his private papers, but rather among those in the custody of the clerk of the peace (g). The legal custody of a document appointing a particular person to an office, such as overseer, is in that person; for he is the party

(e) *Brewster v. Sewell*, 3 B. & A. 296. See also *R. v. Earl Farleigh*, 6 D. & R. 146.

(f) *M'Gahey v. Alston*, 2 M. & W. 213. Where the warrant to the officer to seize under a *fi. fa.* was not produced, nor was any notice given to produce it; it appeared to have been given to the son of the officer, who believed he had either returned it to his father or to the sheriff's office, and the officer stated that it was usual to deliver it to the auctioneer, who transmitted it, with the auction sheet, to the Excise Officer,

through the district supervisor, and proof was given of search made by the auctioneer among his own papers, and at the sheriff's office, but the supervisor was not called, nor was any search amongst his papers proved; held, that sufficient diligence was proved to let in secondary evidence of the warrant to connect the officer with the warrant. *Minshull v. Lloyd*, 2 M. & W. 450.

(g) *Freeman v. Artell*, 2 B. & C. 494. 3 D. & R. 669.

Evidence of
search.

most interested in the instrument, and requires its production as a sanction for what he does under its authority (*h*). A presumption therefore arises that such an officer has the custody of his appointment, consequently parol evidence cannot be given of such an appointment without proof of application to him (*i*).

Where the witness applying to the vicar for the register of baptism, is told that there were none prior to a particular date, the vicar not being called, his declaration is not evidence of the loss of such register, so as to let in secondary evidence (*h*); copies of the returns filed in the bishop's registry prior to 55 Geo. 3, c. 146, ss. 6, 7, are admissible as original evidence, and as public documents copies are admissible. Where the production of the instrument is on legal grounds impossible, the effect is the same in respect of secondary evidence as if it had been lost or destroyed. As where it is in a foreign country from whence it cannot be removed (*l*). So if the instrument on grounds of policy cannot be read (*m*). So if a party objects to the production of a deed by one who has possession as his trustee (*n*).

(*h*) Per Lord Ellenborough, *R. v. Stoke Golding*, 1 B. & A. 173. In replevin and avowry by the defendants, as overseers, for a distress for poor's-rates, evidence that on one being applied to for his appointment, he said he had lost it, was held to be a sufficient search to let in secondary evidence, the party not being capable of being called. *Bristol Governors of Poor v. Wait*, 6 C. & P. 591.

(*i*) 1 B. & A. 173; and as to the custody of a sheriff's warrant, see 1 Starkie's C. 413. Where on a motion for a new trial, a document had been handed up to the judges and could not afterwards be found; it was held that no search was necessary to be made at the judge's chambers, as it was to be presumed to have been returned to the party producing it.

(*h*) *Walker v. Beauchamp*, 6 C. & P. 555.

(*l*) *Alivon v. Furnival*, 1 Cr. M. & R. 277. But where a will, under which the lessor of plaintiff claimed, was in the hands of a mortgagee, who was subpoenaed to produce it, but refused to do so, as being part of his title; held, that secondary evidence of the contents was inadmissible. (Per Abinger, L. C. B. denying *Mills v. Odly*, 6 C. & P. 728, to be law.) *Doe v. Owen*, 8 C. & P. 110. *Dawson v.*

Fuller, 6 C. & P. 74. In *assumpsit* for money received, being the amount of a bill which the defendant had obtained, and paid into his banker's; held that the bill not being produced, nor any account of it given, the banker's clerk could not be asked as to a bill paid in by the defendant, answering to it in description, and credited to him; it afterwards appearing that the bill was in Scotland, and not within the jurisdiction as that the plaintiff could compel the production of it, a new trial was granted on payment of costs. *Atkins v. Owen*, 2 Ad. & Ell. 35; and 4 Nev. & M. 123.

(*m*) Starkie's C. So if a document lie in the hands of an attorney, and out of regard to the client's privilege, cannot be read. *Mills v. Odly*, 6 C. & P. 732. *Marston v. Downes*, 1 Ad. & Ell. 31. But see above, note (*l*), and the Append. Vol. 1. p. 392.

(*n*) Where the defendant called a party, who as trustee held a deed of composition between the plaintiff and other creditors and the mother of the defendant, but the latter was no party to it, and the plaintiff objected to its being produced; held, that secondary evidence might be given of its contents by a party who had made an extract from it. (*Per Gurney, B.*) *Cocks v. Nash*, 6 C. & P. 154.

When sufficient evidence has been given of the loss of the deed or other instrument, of which it seems that the Court is to judge (*p*), it must be shown that the instrument existed as a genuine instrument (*q*); that it was written on stamped (*r*) paper or parchment; and in case of apprentice deeds, what sum was paid with the apprentice, and that the deed bore an *ad valorem* stamp (*s*); for the consciousness of a defect of this nature may have been a motive for concealing or destroying the instrument (*t*). Its execution must be proved according to the nature of the instrument (*u*); if a deed, by means of an attesting witness, or by proof of his handwriting, if he be dead, or that of the obligor, if the deed be not attested, in the manner already stated.

Evidence of execution.

But where proof of the execution would have been dispensed with in case the original had been produced, proof of execution is unnecessary (*x*) where the deed is lost. So where the want of the original is occasioned by the default or misconduct of the adversary.

After proof of the due execution of the original, the contents should be proved by means of a counterpart (*y*), or other original, if there be one, it being an established rule that all originals must be accounted for before secondary evidence can be given of any

Proof by secondary evidence.

(*p*) As also upon questions of the admissibility of dying declarations, see 1 Starkie's C. 522.

(*q*) *Goodier v. Lake*, 1 Atk. 246. *R. v. Sir T. Culpepper*, Skinner, 677. But where the terms of a licence require that the time of sailing should be indorsed thereon, and the licence was burnt at the Custom-house, a proper indorsement was presumed. *Butler v. Almutt*, 1 Starkie's C. 222.

(*r*) Where the plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant upon notice produced his part unstamped, it was held that it might be read in evidence. *Munn v. Godbold*, 3 Bing. 292. See further, Vol. II. tit. STAMP; and see also *Garmons v. Swift*, 1 Taunt. 507. *Waller v. Horsfall*, 1 Camp. 501.

(*s*) See *Goodier v. Lake*, 1 Atk. 446. Burn, J. tit. POOR, p. 366.

(*t*) Where, however, a party in possession of an original deed or other instrument withholds it, after notice to produce, it may under the circumstances be presumed that the instrument was properly stamped. *Crisp v. Anderson*, 1 Starkie's C. 35.

Waller v. Horsfall, 1 Camp. C. 501. *Pooly v. Goodwin*, 4 Ad. & Ell. 94.

(*u*) *R. v. Culpepper*, Skinner, 673, by Lord Hardwicke, C. J. *Goodier v. Lake*, 1 Atk. 246. Where a note has been lost, a copy is not evidence unless the note be proved to be genuine. An indorsement on a draft deed in the handwriting of one of the defendants is not sufficient evidence of the execution of such deed to let in secondary evidence of its contents. *Doe v. Whitefoot*, 8 C. & P. 270.

(*x*) *Goodier v. Lake*, 1 Atk. 246.

(*y*) The counterpart of a lease, purporting to have been executed by the lessee of a lease granted by the mortgagor in conjunction with the mortgagee of certain premises, cannot be read in evidence against one who claims under the mortgagee, without some evidence that the original lease which has been lost was executed by the mortgagee. *Doe v. Trapaud*, 1 Starkie's C. 281. But it was held, that proof that the original lease was signed by the mortgagee, the attesting witness not being known, would be sufficient to warrant the reading of the counterpart. *Ib*.

Secondary
evidence.

one (y); no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced (z), even although such counterpart was not stamped (a). If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original (b). If there be no copy, the party may produce an abstract, or give in evidence a deed executed by the adversary, in which the instrument to be proved is cited (c); or even give parol evidence of the contents of a deed (d). It has been said, that where possession has gone along with a

(y) *Pritchard v. Symonds*, B. N. P. 254. *R. v. Castleton*, 6 T. R. 236. Per Parke, J. in *Alison v. Furnival*, 1 Cr. M. & R. 292. *Brown v. Woodman*, C. C. P. 200, *infra*, note (g). The contents of a tablet in the church was admitted without producing an examined copy. *Doe d. Coyles v. Cole*, 6 C. & P. 869.

(z) *R. v. Castleton*, 6 T. R. 236. *Thurston v. Delahay*, Hereford Ass. 1744. B.N.B. 254, *semble*. *R. v. Kirby Stephen*, B. S. C. 664. *Villiers v. Villiers*, 2 Atk. 71. 1 Camp. 192. 501. *Liebman v. Pooley*, 1 Starkie's C. 176. *Doxon v. Haigh*, 1 Esp. C. 109. *Alison v. Furnival*, 1 Cr. M. & R. 292.

(a) Where it was proved that there were two parts of a deed on which the action was founded, that executed by the defendant being lost, it was held, that the counterpart executed by the plaintiff, and not the draft, was the next best evidence, and admissible in evidence as an authenticated copy, although not stamped. *Munn v. Godbold*, 3 Bing. 292. And see *Villiers v. Villiers*, 2 Atk. 71; and B. N. P. 254.

(b) B. N. P. 254. 1 Keb. 117. *R. v. Kirby Stephen*, B. S. C. 664; *supra*, note (g) An entry in the register-book at the Custom-house, stating that a certificate of register was granted on an affidavit by A. that he was an owner, is not admissible as secondary evidence of the contents of the affidavit. Some person who has seen the affidavit, and knows it was made by A., must be called. *Teed v. Martin*, 4 Camp. C. 90. Where one writing is offered as secondary evidence of the contents of another, it is not necessary to prove that one was taken from the other, or that they have been collated; it is sufficient if both

were copied from the same draft, by a person who believes them to be correct. *Medlicott v. Joyner*, 1 Mod. 4. Where there are several parts of a deed, of which one is in the hands of the defendant, who has notice to produce it, and the others are inaccessible to the plaintiff, he may give a copy in evidence. *Doxon v. Haigh*, 1 Esp. C. 409.

(c) See *Burnett v. Lynch*, 5 B. & C. 601. Com. Dig. tit. Ev. B. 5. *Skipwith v. Shirley*, 11 Ves. 64. If proof can be given of a complete copy, such proof is no doubt preferable to a mere abstract, and it has been doubted whether proof of an abstract is sufficient where a copy appears to be in existence. See *Doe v. Wainwright*, 1 Nev. & P. 81, and see *Munn v. Godbold*, 3 Bing. 294. As a general rule, however, the law does not seem to recognise gradations of mere secondary evidence after all in the nature of original evidence has been accounted for. See the observations of Parke, J. in *Brown v. Woodman*, 6 C. & P. 206. In that case the defendant having given the plaintiff notice to produce a letter of which he (the defendant) had kept a copy, and the letter not being produced, it was held that he might give parol evidence of its contents, and that he was not bound to put in the copy.

(d) *Sir E. Seymour's case*, 10 Mod. 8. *R. v. Motheringham*, 6 T. R. 556. In trover against the sheriff by assignees, the warrant to the officer having been lost, parol evidence of its contents to connect the officer with the sheriff was held to be admissible, without calling for the entry in the book at the sheriff's office. *Moon v. Raphael*, 7 C. & P. 115.

deed for many years, the original of which is lost or destroyed, an old copy may be given in evidence, without proof that it is a true copy, because it may be impossible to give better evidence (e). The registry of a conveyance in a register county is not evidence, unless the defendant has had notice to produce the conveyance (f). Secondary evidence.

After proof of ineffectual search for the deed of endowment of a vicarage, a chartulary of an abbey to which the rectory formerly belonged, stating the particulars of endowment, and found in the possession of the owner of the abbey lands, is admissible as secondary evidence (g).

(e) B. N. P. 254. Stile, 205. The reason that it may be impossible to give better evidence is by no means a satisfactory one; and in general the contingent impossibility of procuring better evidence will not warrant the admission of evidence which is in itself otherwise defective. The reception of evidence from necessity must be founded on a general necessity, or probability of the failure of all other and superior evidence arising out of the nature of the case; as in the instance of servants and agents (see tit. INTEREST). *Qu.* whether in the above case such a copy would be evidence, without some proof of its being a true copy of a lost original. See Bac. Ab. Ev. F. 646.

(f) *Molton v. Harris*, 2 Esp. C. 549. An examined copy of the registry of a deed in a register county, is admissible as secondary evidence. *Doe v. Kilner*, 2 Carr. & P. C. 289.

(g) Upon the trial of an issue, whether a particular farm in the parish of *S. N.* was discharged of tithes on payment of a modus, after proof of an ineffectual search for the original endowment and appropriation, a book was produced, said to be an old ledger or chartulary of the abbey of Glastonbury, from the muniment-room of the Marquis of Bath (the owner of the abbey lands), containing entries, showing that at the time of those entries the small tithes were assigned to the vicar, no mention being made of any money modus; the book contained also other entries relating to the appropriation of the rectory and endowment of the vicarage. This book having been rejected on the trial, on a motion for a new trial its admissibility was objected

to on two grounds: 1st, that it had not been shown to have belonged to the abbey of Glastonbury; and 2d, that the evidence did not bear upon the facts in issue. But upon the first objection, the Court was of opinion, that search having been made, as was admitted, in every place where the endowment itself might be expected to be found, and none being found, a copy was evidence. That such a book, containing a description of the estates of an abbey, and the transactions concerning them, would, on the dissolution of the abbey, go to the officers of the Crown, and from them to the grantees under the Crown; and, consequently, that the only possible way of showing the connexion between the book and the abbey was by proving a connexion between the possessor and the Crown, by showing him to be in possession of lands which passed from the abbey to the Crown, and from the Crown to the grantee. That supposing the book to have been traced to the custody of the abbot, the account it contained of the particular matters of endowment was admissible, the endowment itself not having been found after search in the natural places of deposit. *Bullen v. Michell*, 2 Price, 309. Judgment was affirmed in the House of Lords, 4 Dow. 208. Lord Redesdale, in giving his judgment, observed, that as the original instruments would, if they could have been produced, have been admissible in evidence, the only question was, whether the entries in the book were evidence of the license of appropriation and endowment. That they were admissible as the next best evidence that could be produced. The two instruments seemed, he said, to have been copied

Of a letter
copied by
a clerk.

After notice to the plaintiff to produce a letter, which he admitted to have received from the defendant, it was held, that an entry by a deceased clerk, in a letter-book, professing to be a copy of a letter from the defendant to the plaintiff, of the same date, was admissible evidence of the contents, proof having been given, that according to the course of business, letters of business written by the plaintiff were copied by this clerk, and then sent off by the post (*h*); and Lord Ellenborough observed, that if such evidence were not to be admitted, the most careful merchant would be unable to prove the contents of a letter after the death of his entering clerk.

In proving the contents of a letter, it is not necessary to call the clerk who wrote the letter, although his testimony may be had. It is sufficient to prove it by any other witness who recollects the contents; for it is merely contingent whether the clerk who wrote the document would recollect its contents better than another person (*i*). Where a secretary had made entries of the licences granted by the governor of a colony, in a memorandum-book, on proof of loss of the licence, it was held that parol evidence might be given of the contents without producing the book, and that if the book were to be produced it could not be read in evidence, and would be of no use except to refresh the memory of the witness (*k*).

Where a licence from the Crown has been lost, the contents should be proved by the registry at the Secretary of State's office (*l*).

by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, that the instruments might be preserved. And for the same reason it might be presumed that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept.

(*h*) *Pritt v. Fairclough*, 3 Camp. 305. In this case Lord Ellenborough laid stress upon the circumstance that the defendant had admitted the receipt of the letter, and might rebut the evidence by producing the original; but even if there had been no such admission, it seems that the evidence would have been admissible. So the copy of a letter, accompanied with a memorandum, in the handwriting of a deceased clerk, purporting that the ori-

ginal had been forwarded by him, was admitted as evidence, upon proof that this was his usual mode of transacting business. *Hagedorn v. Reid*, 3 Camp. C. 377-9. See also *Roberts v. Bradshaw*, 1 Starkie's C. 28; *Toosey v. Williams*, Mood. & M. 129. *Lord Melville's Case*, 29. Howell's St. Tr. 734.

(*i*) *Liebman v. Pooley*, 1 Starkie's C. 187.

(*k*) *Kensington v. Inglis*, 8 East, 273. In this case the entry in the memorandum-book does not appear to have been a copy of the document which the witness could have sworn to as such, but merely a memorandum of the fact that such a licence had been granted.

(*l*) *Rhind v. Williamson*, 2 Taunt. 237. Upon the impeachment of *Ld. Melville*, 29 Howell's St. Tr. 714, it was proposed to prove the contents of a letter of attorney,

In the case of *Bullen v. Michell*, it was held that an old ledger or chartulary of the Abbey of Glastonbury was admissible as secondary evidence of a licence of appropriation and of the endowment of a vicarage, as between the vicar and occupier of a farm, upon the question whether the farm was discharged of tithes on payment of a modus. And it being considered that the book under the circumstances came from the proper repository, it was held, that it afforded sufficient secondary evidence to prove the two instruments. The Court said the two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey that the instruments should be preserved.

Where it was proved that the house of a party in whose custody marriage articles ought to have been, had been occupied and pillaged by rebels and foreign troops, and that after diligent search amongst his papers they could not be found, it was held that a recital of them, in a case submitted to counsel at the time, and charged for and entered as paid by the family attorney, was admissible as secondary evidence (*m*).

Where the plaintiff, on being called upon to produce a grant,

under which it was alleged that Mr. Douglas had been directed by Lord Melville to apply to the Treasury for monies from time to time as his paymaster; and for this purpose the Managers offered in evidence an entry in a book kept in the Exchequer, which book contained copies of all the letters of attorney for the receipt of money at the Exchequer. No such letter had been found after diligent search among Mr. Douglas's papers shortly after his death, but it was proved that an official order had been made out for Mr. Douglas to receive the money under a letter of attorney; and the fact of Mr. Douglas's appointment as paymaster was proved by a letter in Lord Melville's handwriting, and the clerk of the office proved that he had made the entry from an official letter of attorney. After argument, the entry was rejected. There is no legal proof (said the Lord Chancellor) of Lord Melville's handwriting, and it does not appear whether the attesting witnesses are living or dead; nor does it appear that Mr. Douglas ever received any money under that appointment. For these reasons, it

was determined that the managers had not entitled themselves to read the paper: upon this the managers proceeded further, and tendered in evidence, a certificate signed by Mr. Douglas as paymaster, and given by him to the Navy-office, acknowledging the receipt of money by him at the Exchequer. The Managers then produced entries in the Bank books, signed by Lord Melville and Mr. Douglas, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated that he had some recollection, though very slight (for the entry bore date about 24 years before this time), of providing a stamp for the power of attorney from Lord Melville to Mr. Douglas, and of attesting it at the Navy Pay-office. Upon this evidence the Lord Chancellor declared his opinion that the entry was admissible, and the Lords allowed it to be read.

(*m*) *Ld. Lorton v. Gore*, 1 Dow, N. S. 190.

Secondary
evidence.

produced an ancient parchment, without either signatures or seals, it was held to have been rightly received, as a document coming out of the hands of the opposite party, and not as a deed, nor as evidence of one (*n*).

Where an assignment had been lost before it had been entered of record, pursuant to the 6 Geo. 4, c. 16, s. 96, it was held that secondary evidence of it was admissible (*o*).

In proving an examined copy, it is sufficient to prove that whilst one read the original, the other read the copy (*p*).

When in
the posses-
sion of the
adversary.

If the deed or other instrument be in the possession of the adversary in a civil, or of the defendant in a criminal case, proof must be given of that fact (*q*); and it must next be shown that the adverse party, or his attorney, has had notice to produce it (*r*). It has been said that this rule applies even where there is evidence to prove the destruction of the instrument (*s*). Proof of the delivery of a paper to the servant of the defendant, without calling the servant, was in a criminal case held to be insufficient proof of the possession of the paper by the defendant (*t*). But proof that a deed came into the hands of the defendant's brother, under whom the defendant claimed, was held to warrant the reading of a copy (*u*), even although the defendant had sworn, in an answer in Chancery, that he had not got the original. Proof of this kind must depend much upon the circumstances of the particular case (*x*). The fact of the adversary's possession may be proved by circumstances, and for this purpose the particular course of duty and office is admissible to raise a presumption of such possession (*y*). Presumptive evi-

(*n*) *Tyrchitt v. Wynne*, 2 B. & A. 554. It was held to be entitled to but little credit, since the acts of enjoyment had been inconsistent with it.

(*o*) *Giles v. Smith*, 1 Cr. M. & R. 462; 1 Tyrw. 15.

(*p*) *Rolfe v. Dart*, 2 Taunt. 52.

(*q*) Where it was sworn that the original lease had been stolen from the plaintiff by a party, at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant, the Court made a rule absolute for giving secondary evidence of its contents. *Doe d. Pearson v. Ries*, 7 Bing. 725.

(*r*) *R. v. Stoke Golding*, 1 B. & A. 173. Even in penal actions and criminal proceedings, notice to the defendant's attorney is sufficient. *Cater v. Winter*,

3 T. R. 306. 2 T. R. 201. *R v. Watson*, Leach, 214.

(*s*) *Doe v. Morris*, 3 Ad. & Ell. 50. *Tamen*, qu. for after destruction of the instrument it is no longer in the possession of any one.

(*t*) *R. v. Pearce*, Peake's C. 75. *Gordon's Case*, Leach 244.

(*u*) *Pritchard v. Symonds*, Hereford As. 1744. B. N. P. 254.

(*x*) *Baldney v. Ritchie*, 1 Starkie's C. 338.

(*y*) See *Hetherington v. Kemp*, 4 Camp. C. 193; *Starkies' C. Hagedorn v. Reid*, 3 Camp. 377. *Toosey v. Williams*, 1 Mood. & M. C. 129. The defendant's clerk produced a letter-book, containing the copy of a letter in his handwriting: the course was, for the clerk to copy all such letters (to India), which, when copied, were delivered to the defendant to be

dence having been given that defendant had obtained his certificate under a commission of bankrupt, it was presumed that it was in the defendant's possession (z). .

Possession
by the ad-
versary.

An appointment of an officer as an overseer is presumed to be in the possession of the officer (a).

Proof that a letter was sent purporting to enclose a bill, and that a bill answering the description in the letter was shortly after in the possession of the party, was held to be presumptive evidence that he received both letter and bill (b).

Where an apprentice deed is cancelled by the master on payment of money, he is bound to deliver the indenture up to the apprentice (c). Documents relating to an estate are presumed to have been delivered to an assignee (d). The fact of a letter having been sent to a deceased party several years before her death, was held to be insufficient to found a presumption that it was in the possession of her administratrix (e).

A party, after notice to produce a document, cannot get rid of it by transferring the possession of the instrument to another person before the trial, for this is *in fraudem legis* (f).

sealed, and then carried by the witness or another clerk to the India-house; there was no particular place of deposit for such letters in the office, for the letters to be so carried; both the clerks swore that they always carried the letters delivered to them for that purpose, but neither of them had any recollection of the particular letter. Lord Tenterden, with great reluctance, rejected the evidence, observing, that the practice differed from that in most counting-houses; and that, if the duty of the clerks had been to see the letters so copied carried to the post-office, it might have done, but that there was something else to be done, and that by the defendant.

(z) *Henry v. Leigh*, 3 Camp. C. 502.

(a) An indenture of apprenticeship, made 1797, having been signed only by one overseer of the appellant parish, the respondent parish, to show that only one had been appointed in that year, called upon the appellants to produce the original appointment (having given them notice to produce all books and writings relating thereto); one book only was produced, and that was not for the year 1797. Held, that the respondents not having taken any

means to procure the testimony of the overseer himself (who must be presumed to have the custody of the original appointment), were not entitled to give secondary evidence of its contents. *Rex v. Leicester*, 1 B. & A. 173.

(b) *Kieran v. Johnson*, 1 Starkie's C. 109.

(c) *R. v. Harborton*, 1 T. R. 141.

(d) *Goodtitle v. Saville*, 16 East, 91, n.

(e) *Drew v. Denborough*, 2 Carr. & P. C. 198.

(f) *Knight v. Martin*, 1 Gow. 26; and see *Leeds v. Cook*, 4 Esp. C. 256, and *infra*, 404. But where notice had been given to the party, and upon a second trial was served upon the attorney, who informed the party serving it that the instrument had been assigned to some one whom he did not know, without his privity or knowledge, it was held that the service was insufficient without further inquiry from the defendant. *Ibid.* Where it was sworn that the original lease had been stolen from the plaintiff by a party at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant, the Court made a rule absolute for giving

When in the possession of the adversary.

In some instances it is sufficient to show that the instrument is in the actual possession of one who is in privity with a party, for then the possession of the one is in law the possession of the other. Where the action was brought against the owner for goods supplied for the use of the vessel, and proof was given that the order for the goods was in possession of the captain, it was held that the proof of possession was sufficient (*g*). So for this purpose possession by the under-sheriff is possession by the sheriff (*h*). Possession by the banker of the party is possession by the latter (*i*).

A joint notice having been given to two executors, one of whom has suffered judgment by default, secondary evidence is admissible of a receipt proved to be in the possession of the latter (*k*).

This rule is inapplicable where the party to the suit has not a right to retain as well as inspect the document, as where it is not in the possession of a party in the cause, but of a stake-holder, between him and a third person (*l*), nor does it apply where the party to the suit justifies it under another who has possession of the paper in an independent character (*m*).

Notice to produce the deed, &c.

The instrument having been proved to be in the possession of the adversary, the next step is to prove the notice to produce it. It is sufficient to prove service of notice to produce a deed or other instrument, either on the party or his attorney, in criminal as well as civil cases (*n*). This must appear to be a reasonable

secondary evidence of its contents. *Doe d. Pearson v. Ries*, 7 Bing. 725. Where a party had notice to produce an instrument, and did not say he had not got it, although, in fact, he had delivered it at the Stamp-office, the adversary was permitted to give secondary evidence. *Sinclair v. Stephenson*, 1 C. & P. 585.

(*g*) *Baldney v. Ritchie*, 1 Starkie's C. 338.

(*h*) *Taplin v. Atty*, 1 Ry. & Mo. C. 164.

(*i*) Seems where the writing is not traced to the hands of the under-sheriff, *Morrison v. Bell*, Starkie's C. 415. *Partridge v. Coates*, 1 Ry. & Mood. C. 156. And see *Sinclair v. Stephenson*, 1 C. & P. 782. *Burton v. Payne*, 2 C. & P. 520.

(*k*) *Beckwith v. Bonner*, 6 C. & P. 682.

(*l*) *Parry v. May*, 1 Mo. & R. 279.

(*m*) *Evans v. Sweet*, R. & M. 83. And see *Pritchard v. Symonds*, B. N. P. 254. *R. v. Pearce*, Peake's C. 70. Where a

party in possession of books, &c. belonging to a committee, of which he had been a member, had them delivered to him as a member of another society, which had subsequently occupied the same office; held that he could not be deemed to be so connected with the former as to let in secondary evidence of the contents, after notice to the defendants, his former co-adjutors, he holding them in a new character. (*per Tindal, C. J.*) *Whitford v. Tutin*, 6 C. & P. 228.

(*n*) *Attorney-General v. Le Marchand*, 2 T. R. 201. *R. v. Watson*, ib. 199. *Cates v. Winter*, 3 T. R. 306. *Trist v. Johnson*, 1 Mo. & R. 259. *R. v. Ellicombe*, ib. 260. The notice it seems ought to be on the attorney if there be one. *Per Gurney, B.* *Houseman v. Roberts*, 5 C. & P. 394. Where the attorney has been changed, a notice served on the first attorney is sufficient. *Doe v. Martin*, 1 Mo. & R. 242. It is to be presumed that a party who goes abroad,

notice (o). A notice to produce a written instrument is usually in writing, but it may, it seems, be by parol (p); and then it may be proved by any witness who heard the notice given (q). The usual course is, as well in the case of notices to produce documents upon the trial, as in giving notice to quit, or notice of the dishonour of a bill of exchange, to make out duplicate notices, and the witness who serves one compares them with each other,

Notice to produce, the deed, &c.

leaves with his attorney, who is to conduct the trial, all necessary papers. *Ib.* But it is for the judge to determine whether the papers required to be produced were so necessarily connected with the cause as to render it probable that they would be delivered to the attorney. *Per Lord Tenterden*, in *Vice v. Lady Anson*, M. & M. 97. And *qu.* whether the rule ought not to be extended to cases of parties resident in England. *Ib.* A notice for the assizes should be served before the commission-day. *Trist v. Johnson*, 1 Mo. & R. 259. Upon an indictment for arson, when the commission-day was on the 15th, notice was served on the prisoner in gaol on the 18th, and the trial was on the 20th, the notice was held to be too late. *R. v. Ellicombe*, 5 C. & P. 522. Notice to a prisoner to produce a deed after the commencement of the assizes, at which he was tried for felony, was held to be insufficient. *R. v. Haworth*, York Lent Assizes, 1830, cor. Parke, J. Notice by the plaintiff was served on Saturday, in Essex, to produce a deed on a trial at the assizes which commenced on the following Monday; the attorney went to London and fetched the deed; a notice was served on the Monday evening to produce another deed; the attorney offered to procure it if the plaintiff would pay the expense; no offer of payment was made; the trial was on Thursday. Held that the plaintiff was not entitled to give secondary evidence of the latter deed. *Doe v. Spitty*, 3 B. & Ad. 182. For the defendant was not bound to permit the deed to be sent by a coach, the plaintiff refusing to pay for a special messenger. See also as to service of notice at the assizes, *Hengist v. Fothergill*, 5 C. & P. 303. In an action against partners, the defence was that the bill had been accepted by one for his private debt, with

the knowledge of the plaintiff. Held that other bills accepted by that partner, and paid, were not so connected with the subject of the trial as to render a notice on the attorney to produce them (too late for him to obtain them from his client) sufficient to let in secondary evidence of them. *Affalo v. Fourdrinier*, 1 M. & M. 335.

(o) It seems that in a town cause, service on the attorney the evening before the trial is sufficient; *Atkins v. Meredith*, 4 Dowl. P. C. 639, per Gurney, B.; but service on the party on Saturday evening for Monday, was held to be insufficient. *Housman v. Roberts*, 5 C. & P. 394. Where, under the circumstances, it cannot be presumed that the document (e. g. a tradesman's book,) is in the possession of the attorney, notice to the attorney on the preceding evening is insufficient, although the client reside in London. *Atkins v. Meredith*, 4 Dowl. P. C. 639. In a town cause, service of notice upon the wife of the attorney of the defendant, late in the evening of the night before the trial, was held to be insufficient. *Doe v. Guy*, 1 Starkie's C. 283. So was service at seven in the evening of the day before the trial, at the office of the attorney, who had then left his office. *Sims v. Kitchen*, 5 Esp. C. 46; *S. P. Atkinson v. Carter*, 2 Ch. 403. So where the service was too late to enable the attorney to communicate with his client. *Byrne v. Harvey*, 2 Mo. & M. 89. Notice to produce a paper, given to the attorney on the evening of the second day before the trial, the party being then abroad, was held to be sufficient. *Bryan v. Wagstaff*, 1 Ry. & M. 128.

(p) *Smith v. Young*, 1 Camp. 440. If both a written and oral notice have been given, proof of either will suffice. *Ibid.*

(q) 4 Esp. C. 203. 1 Esp. C. 445.

Proof of
notice to
produce.

and upon the trial proves their correspondence, and the delivery of one of them to the attorney of the opposite party (r).

It is a general rule that proof of notice to produce a notice is not requisite; if it were, the necessity would extend in *infinitum*, as each additional notice to produce the preceding would require the same proof (s).

The notice will be insufficient if it be entitled in a wrong cause. In an action by the plaintiffs *A.* and *B.*, assignees of *C.* (a bankrupt) v. *E.*, a notice to produce a document was intitled *A.* and *B.* assignees of *C.* and *D.* v. *E.*, and this was held to be insufficient, although *A.* and *B.* were in fact the assignees of *C.* and *D.* under a joint commission (t).

Where a document is produced in consequence of notice, and part is read, the party who produces it is, in general, entitled to have the whole read (u); but where notice was given to produce a letter which expressed that it covered several enclosures, but without referring to them particularly, it was held that the party

(r) *Jory v. Orchard*, 2 B. & P. 41. Where, however, in cases of bills of exchange, &c. the notice served is a sole original, notice must be given to produce it. See Vol. II. tit. NOTICE. Where a great number of impressions are printed at the same time, they are in the nature of duplicate originals. See *R. v. Watson*, 2 Starkie's C. 140, where it was held that a number of copies of a placard having been printed by order of the prisoner, who had taken away twenty-five of them from the printers, one of the remainder might be read without giving notice to the prisoner to produce the twenty-five. And see *R. v. Pearce*, Peake's C. 75.

(s) See Vol. II. tit. NOTICE.

(t) *Harvey and others v. Morgan*, 2 Starkie's C. 17, cor. Lord Ellenborough, and afterwards by the Court of King's Bench, on motion for a new trial, on the ground that the notice was sufficient, and that secondary evidence ought to have been admitted. In an action for work and labour done as a singer, notice had been given to the defendant to produce all letters, papers, books, receipts, vouchers, memorandums, and all other documents written by the plaintiff to the defendant, or by the defendant to the plaintiff or otherwise; and it was held to be sufficient to warrant parol evidence of a memorandum, signed

by the defendant, and delivered to a witness, and afterwards re-delivered to the defendant, stating the terms of engagement. *Jones v. Hilton*, Lancaster Sp. Ass. 1825, cor. Holroyd, J. Notice to produce "letters and copies of letters, also all books relating to this cause," was held to be too general, and insufficient to let in secondary evidence of the contents of letters. *Jones v. Edwards*, 1 M. & Y. 139. So a notice to produce "all letters, papers, and documents touching and concerning the bill of exchange mentioned in the declaration, is too general, not pointing out the particular letter required. *France v. Lucy*, R. & M. 341. But a general notice to produce all letters written by the said plaintiff to the said defendant relating to the matter in dispute, was held sufficient to let in, as secondary evidence, a particular letter, although not specified as to date, because the notice did specify the names of the parties by and to whom the letters were addressed. *Jacob v. Lee*, 2 Mo. & R. 33. A notice to produce a letter, which letter expresses that it covers several papers, without particularly referring to them, does not entitle the party to have the enclosures read. *Johnson v. Gilson*, 4 Esp. C. 21.

(u) *Infra*, 414.

producing the letter was not entitled to have the enclosures read (*w*). Notice to produce, &c.

It is to be observed, that notice to produce a document in the hands of an adversary does not make it evidence for him unless the instrument be called for (*x*), although the omission to call for it after notice may raise a presumption unfavourable to the party who gave the notice (*y*). But if the party giving notice call for it and inspect it, he makes it evidence, although he does not read it (*z*).

It is also a general rule that a defendant, although he has given notice to his adversary to produce a particular document, cannot insist upon the production, or give parol evidence of the contents, until the plaintiff's case has been closed (*a*).

The reason for giving notice, and the necessity for giving it, cease when, from the very nature of the suit or prosecution, the party must know that he is charged with the possession of the instrument. Consequently, in an action of trover for a bond or note, parol evidence of the instrument may be given although no previous notice be proved (*b*); and in a prosecution for stealing such an instrument, the same rule applies (*c*). So also in trials When unnecessary.

(*w*) *Johnson v. Gilson*, 4 Esp. C. 21. And where a shop book was produced, in pursuance of notice, it was held that the party who produced it was not entitled to read other entries in the book, which had no reference to those which had been read by the adversary.

(*x*) *Sayer v. Kitchen*, 1 Esp. C. 210. Nor even although called for, unless it be inspected or otherwise used. See below.

(*y*) Per Lord Kenyon, *ib.* In general, however, there is little to presume in such a case; it is usual in practice to give a general notice to produce books, &c. but it would be impolitic to call for them unless something were known as to their contents.

(*z*) *Wharam v. Routledge*, 5 Esp. C. 210. *Calvert v. Flower*, 7 C. & P. 386.

(*a*) *Graham v. Dyster*, 2 Starkie's C. 23. *Sideways v. Dyson*, *ibid.* 49. On the cross-examination of one of the plaintiff's witnesses, the defendant's counsel required the production of the plaintiff's books, notice having been given for that purpose. The plaintiff refused to produce them in that stage of the business, before the defendant had gone into his case. The

defendant's counsel then proposed to give parol evidence of the entries; but Lord Ellenborough said, that, in strictness, the evidence could not be anticipated, although it was rigorous to insist upon the rule, and a close adherence to it might be productive of inconvenience.

(*b*) *Scott v. Jones*, 4 Taunt. 865. *How v. Hall*, 14 East, 274. *Jolley v. Taylor*, 1 Camp. 143. *Butcher v. Jarratt*, 3 Bos. & Pull. 143. *Wood v. Strickland*, 2 Mer. 461. *Whitehead v. Scott*, 2 Mood. & M. 2. *Colling v. Treveck*, 6 B. & C. 398. In equity, each party knows previously what evidence has been given, and therefore there is not the same necessity for notice. Where usury is stated to have been committed in discounting the bill upon which the action is brought, and another bill, in one undivided transaction, no parol evidence is admissible as to the contents of the latter, unless notice has been given to produce it. *Hattam v. Withers*, 1 Esp. C. 259. Cor. Kenyon, C. J. 1795.

(*c*) *R. v. Aickles*, 1 Leach's C. 436. So on an indictment for forging a bill of exchange, which the prisoner had swallowed.

Notice to
produce,
when un-
necessary.

for treason, where the prisoner has been proved to be in possession of the original (*g*). In an action for breach of promise of marriage, it appeared that a witness who had been served with a *subpœnâ duces tecum* to produce a letter written by the plaintiff to the witness, had, since the commencement of the action, delivered it to the plaintiff; and although no notice had been given to the plaintiff to produce it, Lord Ellenborough admitted evidence of the contents, since the document belonged to the witness, and had been subtracted in fraud of the subpœna; it was therefore admissible as in *odium spoliatoris* (*h*). Where proof had been given that a conspirator in a case of high treason, had procured the possession of certain printed placards, it was held that they were duplicate originals, and that one might be read in evidence without notice to produce the original (*i*). Where a party at a public meeting delivered to a person present a written paper as a copy of the resolutions about to be read, and which corresponded with the resolutions so read, it was held to be good evidence to prove the resolutions, without previous notice to produce the paper from which the resolutions were read (*k*). Notice is in general unnecessary, where a duplicate original can be proved (*l*). Proof that the adversary or his attorney has the deed or other instrument in court, does not supersede the necessity of notice; for the object of the notice is not merely to enable the party to bring the instrument itself into court, but also to provide such evidence as the exigency of the case may require to support or impeach the instrument (*m*).

R. v. Spragge, cor. Buller, J. on the Northern circuit, cited by Lord Ellenborough in *How v. Hall*, 14 East, 276. *Butler's case*, 13 Howell's St. Tr. 1254.

(*g*) *Francia's case*, 15 Howell's St. Tr. 941. In *R. v. Moors*, 6 East, 421, n., upon an indictment for administering unlawful oaths, a witness swore to the terms of one spoken by the prisoner whilst he held a paper in his hand, and it was held that notice to produce the paper was unnecessary. And so it is generally, without resorting to the principle now under consideration, where evidence is given of what the party has said. And see *R. v. Layer*, 6 St. Tr. 263. *R. v. De la Motte*, East, P. C. 124. The letters in the latter case had been opened at the post-office.

(*h*) *Leeds v. Cook*, 4 Esp. C. 256. *Doe v. Ries*, 7 Bing. 724.

(*i*) *R. v. Watson*, 2 Starkie's C. 138. A

copy of a letter taken by a copying machine, is not evidence without notice to produce the original. *Nodin v. Murray*, 3 Campb. 228. *Holland v. Reeves*, 7 C. & P. 38.

(*k*) *R. v. Hunt*, 3 B. & A. 572.

(*l*) See Vol. II. tit. NOTICE. *Colling v. Treveck*, 6 B. & C. 398, per Bayley, J. *Philipson v. Chase*, 2 Camp. 110, per Lord Ellenborough. The copy of a bill delivered by an attorney to his client, is evidence, without notice to produce the original. *Anderson, administrator v. May*, 3 Esp. C. 167. And the Court of C. P. refused a rule for a new rule; 2 Bos. & Pul. 237. *Colling v. Treveck*, 6 B. & C. 394. But where no such counterpart has been kept, and no notice has been given, the plaintiff cannot state the items of the bill from his books. *Philipson v. Chase*, 2 Camp. C. 110.

(*m*) See *Doe v. Grey*, 2 Starkie's C. 283,

A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executes it, to prove the execution of the other part which it recites, although no notice has been given to produce the original (*n*). But as against a third person, unless he claim in privity (*o*), a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the party, and that he has had notice to produce it (*p*).

Notice to produce, when unnecessary.

After proof of notice, the adversary either produces the instrument or he does not. If he does produce it, the execution must be proved in the usual way, by means of the attesting witness. This seems to be now settled (*q*), although it was formerly held,

Proof of deed coming from the adversary's possession.

and 4 Burr. 2484. In ejectment on the separate demises of Haldane and of Urry, Haldane proved her title under a will, but a witness stated on cross-examination, that she had conveyed the premises to Urry before the time of the demise laid in the declaration, and that the deed of conveyance was in court. Mr. J. Aston nonsuited the plaintiff, being of opinion that he ought to bring better evidence; and afterwards, Lord Mansfield, and Willes and Aston, Js., were of opinion that the plaintiff had not proved his title. Yates, J. dissent. It would probably be now held, that the evidence was sufficient, since it seems to be clear that the statement on cross-examination was not admissible evidence to prove a conveyance, and consequently that the title under the will remained undisturbed. In debt for rent by the assignee of the lessor, against the assignee of the lessee, the plaintiff's attorney being called to prove the execution of the deed, having on cross-examination admitted that, after the execution, some other deed had been executed between the original parties, but which he declined producing, though in court; held that there having been no notice to produce, he could not be required to state the contents of his client's deeds. *Bate v. Kinsey*, 1 Cr. M. & R. 38; 4 Tyrw. 662. In ejectment, the defendant having admitted the title as heir, and proved a will, duly executed, held, that the plaintiff, not having given notice to produce, could not ask a witness whether the deceased had not a fortnight after, in

the presence of himself and others, signed another paper, and declared it to be his last will; and such latter paper having been traced to the possession of the defendant, the Court could not presume it to have been lost or destroyed. *Doe v. Morris*, 4 Nev. & M. 598.

(*n*) *Burleigh v. Stibbs*, 5 T. R. 405. The declaration alleged that A. B. put himself apprentice to the defendant by a certain indenture executed, &c.; and it was held that this was proved by the proof of that part of the indenture executed by the defendant, and in which it was recited that A. B. had bound himself apprentice to him. So in ejectment, on a clause of re-entry for a forfeiture for non-payment of rent, against an assignee of the lease, proof of the counterpart, executed by the original tenant, is sufficient evidence of his holding on the same terms. *Roe v. Davis*, 7 East, 363. *Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.

(*o*) 7 East, 363. 8 East, 487.

(*p*) Salk. 287. 6 Mod. 225. 12 Vin. Ab. 27, pl. 4, per Grose, J. *R. v. Middlezoy*, 2 T. R. 41. *Supra*, 393.

(*q*) *Gordon v. Secretan*, 8 East, 548. *Doe v. Marquis of Cleveland*, 9 B. & C. 869. *Knight v. Martin*, Gow, 28. An instrument produced by the adverse party, under a notice, cannot be given in evidence as an agreement between such party and a stranger, unless it be stamped. *Doe d. St. John v. Hore*, 2 Esp. C. 724. Where ship's articles come out of the hands of the adverse party upon notice, the subscribing

Proof of deed coming from the adversary's possession.

that where the deed or other instrument came out of the adversary's possession, no proof of execution was requisite (r). In *Gordon v. Secretan* (s), where the plaintiff in an action on a policy of insurance produced an agreement between himself and a stranger to the defendant, in pursuance of notice from the defendant, in order to show that the plaintiff had no interest in the subject-matter insured, it was held that the defendant was bound to prove the execution of the agreement by means of the subscribing witness. In the subsequent case of *Pearce v. Hooper* (t), it was held that if the party producing a deed upon notice was

witness must be called, except in the case of an action by a seaman for wages, for which occasion the articles are made evidence of themselves, by 2 Geo. 2, cap. 26; 2 Geo. 2, cap. 36, s. 2 & 8. *Johnson v. Llewellyn*, 6 Esp. C. 101. And the rule extends to agreements *not under seal*. *Wetherston v. Edgington*, 2 Campb. 95. And see *Cooke v. Stocks*, Tidd, 505, 6. *Bateman v. Philips*, *ibid.* 505. 620, and 4 Taunt. 157. *Taylor v. Osborne*, cited 4 Taunt. 159. 161, 162. In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart, is not bound to prove the execution of the original lease on its being produced by the defendant. *Burnett v. Lynch*, 5 B. & C. 589. In an action to recover a deposit for the purchasing of an estate the plaintiff need not prove the contract of sale produced by the vendor. *Bradshaw v. Bennett*, 1 M. & R. 143. See further *Doe v. Heming*, 6 B. & C. 28. *Doe v. Wainwright*, 1 Nev. & P. 8. The object of the party who means to use the instrument is not material. *Carr v. Burdis*, 1 C. M. & R. 785.

(r) *R. v. Middlezoy*, 2 T. R. 41. 1 Esp. C. 109. Peake's L. Ev. 109.

(s) 8 East, 548.

(t) 3 Taunt. 60. *Carr v. Burdis*, 1 C. M. & R. 785. So where the defendants, assignees of a bankrupt, produced, under a notice from the plaintiff (in an action for use and occupation), the deed of assignment of the bankrupt's effects; it was held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the defendants occupied under the deed. *Mant v. Main-*

waring, 3 B. & B. 139. In an action for work and labour, the defendant produced an agreement, signed by the plaintiff only, and attested, and Bayley, J. held, that proof by the attesting witness was unnecessary. *Mann v. Musgrave*, York Sp. Ass. 1828. In an action for use and occupation, where the defendant holds under a deed in his possession, proof of execution by the plaintiff is unnecessary. *Orr v. Morrice*, 3 B. & B. 139. And in *Cooke v. Tanswell*, 2 Moore, 513, it was held, that after notice to produce a deed in the defendant's possession, *and an omission to produce it*, parol evidence of its contents was admissible without proof of execution. In an action by a lessee against his assignee of a lease, the plaintiff having proved the execution of the counterpart, the original being in the defendant's possession, it was held, that it was unnecessary for the plaintiff to prove the execution of the original on its production by the defendant. *Burnett v. Lynch*, 5 B. & C. 589. Where the lessor of the plaintiff's attorney obtained from a lessee and defendant, the lease to the latter, in order to prevent the lease from being set up as a defence, and afterwards obtained on authority from that lessee to detain the lease; it was held, that on the lease being produced at the instance of the defendant, no proof was necessary. For the lessors of the plaintiff were to derive a benefit from the possession of the lease, and the conduct of their attorney amounted to a recognition of the lease as a valid instrument. *Doe v. Heming*, 6 B. & C. 28. On the sale of premises to the defendant's landlord, a feoffment had been delivered by the vendor, the question was

possessed of a beneficial interest under it, proof of the execution of the deed by his adversary was not necessary. In that case the defendant in trespass called for the deed which conveyed an estate to the plaintiff, and which by its description of the extent excluded the *locus in quo*; and the Court held, that since the plaintiff would have no interest in the estate if the deed did not convey it, the production of the deed was, against himself, good evidence of its execution. The Court, however, in this case, admitted the general doctrine expounded in *Gordon v. Secretan*, and assented to the case put there by way of illustration, of an heir at law who produces a will upon notice given by a devisee named in the will. So where both parties claim an interest under the instrument so produced, such proof is unnecessary. As where the plaintiff claims under the original lessee, and the defendant under the assignment (*u*). An admission by the attorney of the party in possession of the deed before the trial, that the party claims under the deed, has been held to be sufficient (*v*). It does not appear that a party has in any case been entitled to read a deed in evidence without the usual proof, on the ground of its coming out of the possession of the adversary, except where the deed is produced by the adversary upon the trial of the cause (*w*). Where a deed had been received from the possession of the adversary, and remained in the possession of the party producing it for some months previous to the trial, it was held that it could not be read without the ordinary proof (*x*). A parchment coming out of the adversary's possession without either signature or seal, may be read as a document coming out of the adversary's possession, but not as a deed (*y*). If the adversary does not produce it, proof must then be given, as in case of the loss of the deed (*z*). But

Proof of deed coming from the adversary's possession.

as to the premises sought to be recovered by the lessor of plaintiff being parcel of the premises so conveyed, notice had been given to produce the feoffment, which not being done, an abstract thereof was tendered, there being no proof of any copy ever having existed; held, that it was admissible without calling the attesting witness; and that it not being necessary to prove the feoffment, neither was it necessary to prove the livery of seisin. *Doe v. Wainwright*, 1 Nev. & P. 8; 5 Ad. & Ell. 520.

(*u*) *Knight v. Martin*, 1 Gow. 26.

(*v*) *Roe v. Wilkins*, 4 Ad. & Ell. 86. *Martin v. Gow*, 26. As to admissions by

an attorney, see Vol. II. tit. ATTORNEY. ADMISSIONS. Such an admission, if untrue, would operate to the deception of the party to whom it was made.

(*w*) *Vacher v. Cocks*, 1 B. & Ad. 144. And in *Carr v. Burdis*, 1 C. M. & R., Parke, B. observed that if the deed had been given up before the action it might have made a difference.

(*x*) 1 B. & Ad. 144.

(*y*) *Row v. Rawlins*, 7 East, 279; *Tyrwhitt v. Wynne*, 2 B. & A. 554.

(*z*) The party seeking to prove the contents of a document in the adversary's possession, cannot compel him to produce it; all he can do is to give notice to pro-

Proof of deed, &c. in the adversary's possession.

it has been said that slighter evidence will suffice where the deed is in the hands of the adversary than where it is proved to have been lost or destroyed (*a*). Another exception to the general rule is that of a public officer, such as a sheriff, who produces an instrument the execution of which he was bound to procure; as against him, it is presumed to have been duly executed (*b*). Where a party, after notice, refuses to produce an agreement, it is to be presumed, as against him, that it is properly stamped (*c*). Where the declaration in covenant alleged that the deed was in the possession of the defendant, and on *non est factum* pleaded, it was proved that the deed was in the hands of the defendant, to whom notice had been given to produce the deed, and the plaintiff gave parol evidence of the deed, the attesting witness being in court; it was held that the parol evidence was well received (*d*). Where two parts of an agreement are signed by both parties, one of which is stamped, and is in the possession of the defendant; if he refuse to produce it upon notice, the unstamped part is receivable as second-

duce the document, and if he omit to do so, the only consequence is, that the party seeking to give such evidence is entitled, after proof of possession by the adversary, to give secondary evidence of the contents. See *Enticke v. Carrington*, 19 Howell's St. Tr. 103. The *Attorney-general v. Le Marchant*, 2 T. R. 201. *Cooper v. Gibbons*, 3 Camp. 363. But although it be true that the refusal of a party to produce a document in his possession does not authorize any direct inference as to the contents of writing, *Lawson v. Sherwood*, 1 Starkie's C. 315, *Cooper v. Gibbons*, 3 Camp. C. 363, and can in no case supply the defect of proof, where written proof is requisite; as where the action is brought on a bond of which the defendant, the obligee, has obtained possession, there seems to be no rule of law which excludes, or which can exclude a jury from taking this circumstance into consideration, in connection with other circumstances, in forming their conclusion on a matter of fact, to the proof of which written evidence is not essential. It is scarcely possible that an unfavourable presumption should not be made against a trader, who upon the question whether particular goods had been paid for by a customer, refused to produce his books, when called for, to show credit given.

This principle seems, in effect, to be admitted by the authorities (see note *a*), which state that slighter evidence will suffice to prove a deed where it is in the hands of the adversary, than when it is lost or destroyed. See *Rae v. Hervey*, 4 Burr. 2484; *Bate v. Kinzey*, 1 C. M. & R. 41.

(*a*) 19 Mod. 8. 12 Vin. Ab. T. b. 65, pl. 22. Carth. 80. Str. 70. See *Pritt v. Fairclough*, *supra*, 342. In covenant by a remainder-man for not repairing, plea, that lessor was only tenant for life; held, that after notice on the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a *sp. duces tecum*, his knowledge of the contents was not within the principle of privileged communications, which extends not beyond counsel and attorneys. *Earl of Falmouth v. Moss*, 11 Pri. 455.

(*b*) *Scott v. Waitman*, 3 Starkie's C. 108. *Barnes v. Lucas*, 1 Ry. & Mood. C. 264.

(*c*) *Crisp v. Anderson*, 1 Starkie's C. 35; and see *Pooley v. Goodwin*, 4 Ad. & Ell. 90.

(*d*) *Cooke v. Tanswell*, 8 Taunt. 450.

dary evidence of the contents of the other (e). So, although the unstamped counterpart were not signed by the parties (f). If a party after notice does not produce a document in his custody, the party giving the notice is entitled to give secondary evidence of the instrument. And it has been held, that in such case the party giving the notice, may give such secondary evidence without calling the subscribing witnesses (g). Even although he know the name of the subscribing witness (h). The party obliging the adversary to give secondary proof, cannot by retracting or producing the original, compel him to give the ordinary proof (k). Nor can he put it into the hands of a witness, and examine as to the time when an interlineation was made in it (l). Where a party is proved to have destroyed a document which would have been evidence against him, slight evidence will usually be sufficient to supply it (m). The same principle applies where the party for sinister purposes withholds the instrument. Where the instrument is out of the power of the party, secondary evidence is admissible. As where a will remains in Chancery by the order of the Court (n).

Proof of deed, &c. in adversary's possession.

A deed or other instrument may be read without proof of execution, by virtue of a rule of court to that effect (o); or where the party or his attorney makes the admission deliberately for the purposes of the cause (p). If the admission be proved to be

Proof of admission.

(e) *Waller v. Horsfall*, 1 Camp. C. 501. It seems, that where the instrument, if produced by the adversary on notice, would have been admissible in evidence without proof of execution, a copy is also admissible in evidence without proof of execution. *Doxon v. Haigh*, 1 Esp. C. 409. In an action of covenant on an indenture of apprenticeship, where the defendant did not produce it after proof of possession by him and notice, it was held, that the plaintiff might give parol evidence of the contents, without calling the subscribing-witness. *Cooke v. Tanswell*, 8 Taunt. 450.

(f) *Garmons v. Smith*, 1 Taunt. 507.

(g) *Cooke v. Tanswell*, 8 Taunt. 450. Where an instrument has been destroyed and the witness is known, he must be called, *Gillard v. Smither*, 2 Starkie's C. 528. But where the plaintiff declared upon a lost bond, and a witness stated, that there were attesting witnesses whose names he did not know, it was held, that the

plaintiff was entitled to recover without calling either of them. *Keeling v. Hall*, Peake's Ev. App. 82.

(h) *Ib.* per Gibbs, C. J.

(k) *Jackson v. Allen*, 1 Starkie's C. 74.

(l) *Doe v. Cockrell*, 6 C. & P. 526. See *Lewis v. Hartley*, 7 C. & P. 405.

(m) A small matter will supply it. Per Holt, J., Lord Raym. 731.

(n) B. N. P. 254. 11 Co. 92.

(o) 1 Sid. 269. Gilb. Ev. 91. Tr. per Pais, 347.

(p) *Griffiths v. Williams*, 1 T. R. 610. 1 East, 568. *Young v. Wright*, 1 Camp. 140. But mere statements made by an attorney in the course of conversation are not admissible. *Parkins v. Hawkshaw*, 2 Starkie's C. 239. 1 Camp. 140. *Wilson v. Turner*, 1 Taunt. 398. And a mere agreement to produce a particular instrument, does not dispense with the necessity of proof when produced. *Whetherston v. Edgington*, 2 Camp. 94. See Vol. II. tit. ADMISSIONS.

Admission. signed by the attorney on the record, it may be read; but if he be not the attorney on the record, further proof must be given to show that he was the authorized agent of the party (*q*). So if the attorney agree that the other party should act on the instrument, as if the witness had been produced (*r*); or even merely agree to admit the handwriting (*s*). But notwithstanding an agreement by the attorney to admit the due execution of the specialty mentioned in the declaration, the defendant may still object on the ground of variance (*t*). So the deed may be read where it is admitted by the pleadings. In all these cases the consent of parties supersedes the necessity of the usual proof (*u*), since it is the office of the jury to decide upon those facts only which are in controversy. It has been already seen that a mere parol admission, or even an admission in Chancery (*x*), by a party of his execution of a deed, is not sufficient (*y*).

Proof of by enrolment.

By the stat. 27 H. 8, c. 16, a bargain and sale of an estate of inheritance or of freehold, must be enrolled (*z*). And since the law

(*q*) 2 Sid. 269.

(*r*) *Laing v. Raine*, 2 B. & P. 85.

(*s*) *Milward v. Temple*, 1 Camp. C. 375. See B. N. P. 254.

(*t*) *Goldie v. Shuttleworth*, 1 Camp. 70.

(*u*) An admission signed by the obligor's attorney, acknowledging the signature of his client and of the attesting witness, is presumptive evidence of delivery. *Milward v. Temple*, 1 Camp. 375.

(*x*) 4 East, 53. 5 T. R. 306.

(*y*) *Supra*, 371. In one case, where the subscribing witness did not appear, an indorsement by the obligor on the deed was read, reciting a proviso within the deed, that it should be void on payment of a sum of money, and acknowledging the non-payment, and admitting the deed; and this was held to be proof (B. N. P. 254); but note, that in this case the witness did not appear, and *qu.* whether his absence was not accounted for.

(*z*) Deeds were also enrolled at common law *pro salvâ custodiâ*. 1 Salk. 389. The enrolment of a deed under this statute, is a record. *R. v. Hopper*, 3 Price, 495. And therefore is not traversable in any material part, such as the date of the enrolment. 3 Price, 495. Hence an examined copy of a memorial of a deed required to be enrolled by an Act of Parlia-

ment, is evidence of the instrument. Thus it has been held, that an examined copy of the memorial of an assignment of a judgment, which was required to be enrolled, was evidence of the fact of assignment. See *Hobhouse v. Hamilton*, 1 Schoales & Lefroy, 207. In the case of *Baillie v. Chandless*, 3 Camp. C. 17, in an action against an attorney for negligence in the purchase of an annuity, which was void for want of a sufficient memorial, in order to prove the memorial a copy was offered in evidence, which had been examined with the instrument at the Rolls; upon the objection taken, that a copy of the original memorial which the defendant had carried in should be produced, Lord Ellenborough held, that the copy proposed was admissible. The Act required the memorial carried in to be enrolled correctly; and it was to be presumed that those concerned had done their duty under the Act. The enrolment was a sort of statutable record, and an examined copy of it admissible. In the case of *Tinkler v. Walpole*, 14 East, 226, the case of a ship's register was distinguished from that of an enrolment under a statute; Lord Ellenborough observed, "The case of enrolments stands on a particular statute; the statute of Anne provides, that copies of the instrument of

requires such enrolment, it has been held in many cases that enrolment is sufficient evidence of the lawful execution of the deed (a), as against all parties.

Enrolment
of deed.

The practice is admitted, but the principle doubted, in Buller's Law of Nisi Prius (b), both because the authority relied upon in support of such practice is the case of *Smartle v. Williams*, where the acknowledgment was by the bargainor, against whom the enrolment was offered in evidence, and not by the bargainee, as stated in the report in Salkeld (c); and besides, that the bargain and sale in that case was of a mere term, and therefore was not within the statute. But it seems that the enrolment of any deed upon the acknowledgment of a party is evidence against himself, whether the deed does or does not need enrolment, as in the case of *Smartle v. Williams* (d), of a release, and this has been the practice (e). The register of a conveyance in a register county, is not evidence, except as secondary evidence, where the adversary has had notice to pro-

indentures of bargain and sale, examined with the enrolment, signed by the proper officer, and proved on oath, shall have the same force and effect as the original indentures. But the Register Acts have not attributed to the registers the same effect as if the persons named therein were proved to be the owners."

(a) 5 Co. 54. Stile. 455. 1 Keb. 117. Salk. 280. B. N. P. 255, 256. An enrolment of a deed is not a record, because it is not the act of the Court, but only a private act of the party authenticated in court. Gil. Law. Ev. 92. 5 Co. 74, b. But see *R. v. Hopper*, 3 Price, 485, where it was held that the enrolment of a bargain and sale under the stat. of Hen. 8, was a record, that the date was a material part of the record, and that proof of a different date was not admissible. All acknowledgments of deeds in K. B. are to be made on the plea side, in open court (1 Salk. 389), and the enrolment is made either upon the acknowledgment or proof of the delivery of the deed by the party. Com. Dig. Bargain and Sale, B. 6. Godb. 270. 1 Salk. 389. 3 Leon. 84; for the bargainor might die before acknowledgment. After a deed had been enrolled, it seems that a party could not plead *non est factum*, but that he might avoid the effect of it by pleading *riens passa par le fait*. (Gil. L.

Ev. 93. 1 Leon. 184, 5.) And infants, feme coverts (Com. Dig. Bargain and Sale, R. 10), and strangers (ib. and Sav. 91), are not concluded by the enrolment. The indorsement of a registration in Ireland, on a deed executed there, need not be proved, *Pyne v. Dor*, 1 T. R. 55. See also *Smartle v. Williams*, 1 Salk. 281. *Garrick v. Williams*, 3 Taunt. 544. *Taylor v. Jones*, 1 Lord Raym. 746. 1 Keb. 117. *Baikie v. Chandless*, 3 Camp. C. 17.

(b) B. N. P. 259. 3 Lev. 387.

(c) 1 Salk. 281. 3 Lev. 387. Com. Dig. tit. EVIDENCE, B. 1.

(d) It was observed by Bayley, J., in the case of *Tinkler v. Watpole*, 14 East, 230, that in the case of *Smartle v. Williams*, the deed was thirty years old; and see B. N. P. 255, where it is said that if the deed need no enrolment, the enrolment will not be evidence, 5 Co. 54. Stile, 445. 1 Keb. 117. Salk. 280.

(e) B. N. P. 256. In *Lady Holcroft v. Smith*, 2 Freeman, 259, a distinction was made between deeds of bargain and sale, enrolled in pursuance of the statute, and other deeds enrolled; and the Court held, that a copy of a deed enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him.

Enrolment
of deed.

duce the conveyance (*f*). When the deed is enrolled, the indorsement of the enrolment is evidence without further proof, because the officer is entrusted to authenticate such a deed by enrolment (*g*). But where a copy is used as secondary evidence, it must be proved to have been examined with the enrolment (*h*).

When evi-
dence.

A deed purporting to be the deed of several, may be enrolled on the acknowledgment of one alone (*i*), and is sometimes enrolled upon the acknowledgment of a mere nominal party, whose name is introduced for the very purpose, the parties themselves residing abroad (*k*). It would, therefore, be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; as, for instance, to receive a deed acknowledged by a bare trustee, without proof of execution by the owner of the inheritance (*l*). And although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle, that it is not probable that it would now be acted upon.

By the stat. 10 Ann. c. 18, s. 3 (*m*), where in any pleading any indenture of *bargain and sale* enrolled shall be pleaded with a *profert in curiâ*, the person so pleading may produce a copy of the enrolment of such bargain and sale; and such copy, examined and signed by the proper officer, and proved upon oath to be a true copy, shall be of the same force as the indentures of bargain and sale would be.

It is sufficient for a party in ejectment on an annuity deed to prove the deed without proving the enrolment, and it lies on the party who insists on the want of enrolment to prove the negative (*n*). It seems that a bargain and sale and enrolment of lands conveyed to a charity, will not be presumed from long enjoyment (*o*).

(*f*) *Molton v. Harris*, 2 Esp. C. 549. An examined copy is evidence. *White v. Kilner*, 2 C. & P. 289.

(*g*) The production of a deed with the memorial indorsed, is sufficient proof of the enrolment. *Compton v. Chandless*, 4 Esp. C. 18. B. N. P. 229.

(*h*) B. N. P. 220. *Peake's Ev.* 33.

(*i*) B. N. P. 260. *Thurle v. Madison*, Sty. 462.

(*k*) Salk. 389.

(*l*) B. N. P. 256.

(*m*) This provision was made for supplying a failure in pleading or deriving title to lands, conveyed by such deeds of bargain and sale, where the original indentures are wanting, which often happens,

especially where divers lands, &c. are comprised in the same indenture, and afterwards devised to different persons. See 14 East, 231, 1 Schoales & Lefroy, 207. Before this statute an enrolment could not have been pleaded, although a deed had been exemplified under the great seal; it was necessary to make a *profert* of the deed itself under seal. Co. Lit. 225, b.; and see *Oliver v. Gwyn*, Hard. 119; see the stat. 8 Geo. 2, c. 6, s. 22, concerning Deeds of Bargain and Sale of Lands in the North Riding of Yorkshire.

(*n*) *Doe v. Bingham*, 4 B. & A. 672. *Doe v. Wilde*, 3 Camp. 7. As in the case of a proviso in an Act of Parliament.

(*o*) *Doe v. Waterton*, 3 B. & A. 149.

Although it has been held that a deed to lead the uses of a fine requires no proof (*p*), on account of the strong presumption that the parties meant to convey the lands to some uses or other; yet in a subsequent case all the Judges were of opinion that such a deed must be proved (*q*). So it seems that the counterpart of such a deed is not admissible in evidence without the usual proof (*r*).

Deed to lead the uses of a fine.

It has been held that a recital of a deed in a subsequent deed is evidence of the former against a party to the latter. The recital of a lease in a deed of release is evidence of the lease against the releasor, and those who claim under him (*s*); for it operates by way of admission; and therefore such a recital is not evidence against a stranger to the second deed (*t*).

Recital in a deed.

No objection arising intrinsically from the contents of an instrument can preclude the reading of it, for till it has been read the Court cannot judge of the objection (*u*). The deposition of one Cowden was offered in evidence, and proof was given of the death of one Cowden who lived at Bow; and Reynolds, C. B., allowed the

An intrinsic objection will not preclude the reading.

(*p*) B. N. P. 255. *Glasscock v. Warren*, B. N. P. 255.

(*q*) *Griffith v. Moore*, B. N. P. 255.

(*r*) B. N. P. 255; Salk. 287, *contra*.

(*s*) *Ford v. Lord Grey*, 6 Mod. 44. S. C. Salk. 285. *Cragg v. Norfolk*, 2 Lev. 108, 109. *Fitzgerald v. Eustace*, Gilb. L. Ev. 100; Hardr. 123. Mr. Peake, in his *Law of Evidence*, p. 109, 5th ed., states, that although in the above cases it is laid down, that as against a party to the reciting deed, such deed is evidence of the deed recited in it; yet there are others in which this seems to be considered as secondary evidence, and admissible only when the first deed was shown to be lost, or some reason given for not producing the regular and best evidence of it; and he adds, "such is now the general received opinion of the Profession." See Vol. II. tit. ADMISSIONS.—NOTICE.—RECITAL. Com. Dig. Ev. B. 5. In *Ford v. Grey*, 1 Salk. 285, it was ruled, that the recital of a lease in a deed of release, is good evidence of the lease, against the releasor, and those who claim under him. It seems that a recital is always evidence as against the party to a reciting lease, where it operates by way of estoppel, although not against another party where it cannot so operate. See *Cragg v. Norfolk*, 2 Lev. 108; 2 Vent.

171, 172; Roll. 678, l. 40. And therefore the recital, in a grant of an office, of a former grant, on the determination of which the present grant was to commence, is no evidence in favour of the grantee of the former grant. *Ib*. But if one relies on a patent to prove a former grant which it recites, it is also evidence to prove a surrender which it also recites; 2 Vent. 171; Com. Dig. Ev. B. 5. An averment, in a declaration against a master for not inserting the true consideration in an apprenticeship deed, that *A. B.*, by a certain indenture, put himself apprentice to the defendant, is proved by the production of the part executed by the defendant, in which it is recited that *A. B.* put himself apprentice, &c. *Burleigh v. Stibbs*, 5 T. R. 465.

(*t*) *Ibid*.

(*u*) Where an objection was taken to the reading of an entry from a corporation-book, on the ground that it contained many things not relating to the corporation, Lord Hardwicke said that as the objection was derived from the book itself, it was impossible to say that it should not be read; but that if any material objection should appear to the book on reading, he would mention it to the jury on summing up. *Moore v. Mayor of Hastings*, 10 St. Tr. App. 142.

An intrinsic objection will not preclude the reading.

deposition to be read upon this evidence, because it did not appear, otherwise than by the deposition, that Cowden lived elsewhere than at Bow, and therefore the objection, that the Cowden whose death was proved was not the Cowden who made the deposition, was incomplete unless it was coupled with the deposition (x). But he said he would leave it to a jury to determine whether the man whose death was proved was the man who made the deposition (y). If upon the reading it appear that some part is not properly admissible in evidence, as if it rest upon mere hearsay, or if an accomplice in his confession charge a confederate, the Court will, upon summing up, advise the jury to leave the objectionable part out of their consideration (z).

It is also a rule that no intrinsic matter will obviate an extrinsic objection to the reading of the document (a).

The whole of an entire document to be read.

It is also a general rule, that where any document is produced and read by one party, the whole is to be read, if the adversary require it (b); for unless the whole be read there can be no certainty as to the real sense and meaning of the entire document. Upon the same principle, where one document refers to another, the latter is, for the purpose of such reference, incorporated with the former, and may be read to explain it; as where the deposition of the captain of a ship refers to the log-book (c); or a letter produced upon notice refers to other letters (d); or an interrogatory upon the examination of a witness refers to a letter (e). A written answer made by a

(x) *Benson v. Olive*, 1 Ford's M.S. 146.

(y) *Ibid*.

(z) See Lord Hardwicke's observations, 10 St. Tr. App. 142. *Moore v. The Mayor of Hastings*; and of Wood, B. in *Bullen v. Mitchell*, 2 Price, 405.

(a) 1 Ford's MS. 146. *Adamthwaite v. Singe*, 1 Starkie's C. 183.

(b) *Earl of Bath v. Battersea*, 5 Mod. 9; 3 Salk. 159; 1 Ford's MS. 146; Doug. 757; Andr. 258; *Supra*, 334. In equity, when a passage is read from the defendant's answer, all the facts stated in that passage must be read; and if it refer to facts stated in any other passage, that must be read for the purpose of explanation; but if new facts be contained in such other passage, they are to be read for the purpose of explanation only. *Bartlett v. Gillard*, 3 Russ. 167.

(c) *Falconer v. Hanson*, 1 Camp. 171.

Johnson v. Gilson, 4 Esp. C. 21. *Wheeler v. Atkins*, 5 Esp. C. 246.

(d) *Johnson v. Gilson*, 4 Esp. 21; *secus*, if the letter merely state that others are enclosed under its cover. Where letters are put in, bearing different dates, others part of the same correspondence, sent in the interval, cannot be received, unless expressly referred to in those which were put in. *Sturge v. Buchanan*, 2 M. & R. 90.

(e) *Wheeler v. Atkins*, 5 Esp. C. 246; and note, if the interrogating party refuse to produce the letter, he must abandon the whole of the interrogatories. Where, however, a book of accounts, or shop-book, is produced in evidence at the request of one of the parties, the reading an entry from it does not entitle the other party to read all the other entries in the book, but only such as relate to the same particular subject-matter. By Abbott, L. C. J.,

party to a question proposed to him, cannot, it is said, be read without showing the question to which it relates (*f*), not as evidence of the fact, but to explain the answer. The whole is to be read.

But letters written by a party are evidence against him without producing those to which such letters are answers (*g*); and a letter written by the plaintiff's agent to a witness is evidence against the plaintiff (*h*), and does not make the answer of the witness evidence for the plaintiff.

It is also a general rule, that whenever a party makes a statement or admission, whether it be oral or written, which is afterwards used against him as evidence of the stated or admitted fact, the whole of the contemporaneous statement or declaration must be received; the part which operates for him, as well as that which makes against him, is admissible evidence to prove the existence of the fact. Thus where the defendant stated an account, in which he admitted the plaintiff's claim to a certain extent, but stated also a counterclaim for a sum specified, it was admitted that the plaintiff on this evidence was entitled to recover no more than the balance (*i*).

The principle does not apply where another entry happens to be made upon the same paper or parchment, wholly distinct from that which the party reads in evidence (*k*).

Cutt v. Howard, 3 Starkie's C. 6; but see *Wharham v. Routledge*, 5 Esp. C. 235.

(*f*) *Rex v. Pictou*, Howell's St. Tr. vol. 30, p. 466. But an answer in Chancery is evidence as an admission under the defendant's hand, where the bill is proved to have been lost. *Hart v. Harrison*, Mich. 3 Geo. 2, 1 Ford's MS. 145. On an examination before commissioners of bankruptcy, a machine-copy of a letter was produced by the witness, of which the solicitor to the commission took a copy, held, that in an action by the assignees, the latter copy was inadmissible against the party producing the machine-copy, without reading his examination, although notice had been given to produce the machine-copy. *Holland v. Reeves*, 7 C. & P. 36.

(*g*) *Lord Barrymore v. Taylor*, 1 Esp. C. 326. The admission by a witness in court is evidence against him, although he was prevented from entering into any explanation. *Collet v. Lord Keith*, 4 Esp. C. 212. So the examination of a party by

commissioners of bankrupt, signed by him, is evidence, although part only was taken down. *Milward v. Forbes*, 4 Esp. C. 172.

(*h*) Where the plaintiff's agent wrote to a witness (living abroad and examined by commission), the draft of which was shown to and approved by his attorney; held, that the draft was admissible without producing the original, as evidence of an act done, but that the answer of the witness to the agent was not admissible. *Rawlins v. Desborough*, 8 C. & P. 321.

(*i*) *Randle v. Blackburn*, 5 Taunt. 245. So where, in order to prove a sufficient memorandum of an order for goods, within the 17th section of the Statute of Frauds, a letter of the alleged purchaser was read in evidence which admitted the order, but which also asserted that the goods had not been delivered in time; it was held that parol testimony was inadmissible to prove that no time was mentioned. *Cooper v. Smith*, 15 East, 103.

(*k*) See *Adey v. Bridges*, 2 Starkie's C. 180, where, in an action against a

The whole
is to be
read.

The case where a document is read in order to show the incapacity of a witness furnishes an exception to this rule; for the testimony of the witness contained in an instrument which disqualifies him as a witness altogether, is obviously inadmissible (*l*).

And the rule is also subject to the qualification that the additional statement must be so connected with that which has been produced or read as tending to show its true nature and bearing (*m*).

Where a party is under the necessity of producing and proving a writing in order to connect a defendant with the act of an agent, the recital of the authority under which the principal assumes to act will not relieve the latter from the necessity of proving that authority in his own justification by the proper evidence (*n*).

Jury to
judge of
the credit
due to the
whole or
part.

It is a rule equally general with the former, that in a court of law it is for the jury to consider what credit is to be attached to the whole or part of any particular statement, whether oral or written (*o*), although a rule less flexible seems to have been adopted in equity (*p*). It has also been seen that this rule does not make that evidence which has an insufficient legal foundation; as for instance, where that which is stated in the document professes to be the mere belief or opinion of the party, or nothing more than hearsay.

sheriff for a false return, it was held by Holroyd, J., that the plaintiff having given in evidence a copy of the writ, the defendant was not entitled to have his return read, which formed no part of the document which the plaintiff gave in evidence.

(*l*) Bac. Ab. Ev. 622.

(*m*) *Supra*, 334. Action for an assault, a letter had been written by the plaintiff's attorney, containing an apology; it was held, that parts of it extolling his client's character for respectability could not be read, nor was the letter admissible at all, if expressed to be written "without prejudice." *Healey v. Thatcher*, 8 C. & P. 388.

(*n*) *Grey v. Smith*, 1 Camp. 387. Vol. II. tit. TRESPASS.—AGENCY. *Stanley v. Fielden*, 5 B. & A. 425. So a plaintiff in a tithe suit in the Exchequer,

who reads part of the defendant's answer to show what the issues are, is not concluded by the depositions contained in such answer. *Kempson v. Yorke*, 8 Price, 13.

(*o*) In the case of *Bernon v. Woodbridge*, Doug. 757, the whole of the plaintiff's case rested on the testimony of one witness. Lord Mansfield said that the jury might credit what the witness said for the plaintiff, although they disbelieved what he stated for the defendant; but that if they did not believe his testimony for the plaintiff, the rest of his testimony was clearly immaterial, for he was not to be believed at all, and so there was no case proved by the plaintiff. Vide *supra*, 286, and *Partington v. Butcher*, 6 Esp. C. 66, Vol. II. tit. LIMITATIONS.

(*p*) *Supra*, 335. Doug. 757.

OF PROOFS.

HAVING thus touched upon the general principles which regulate the admissibility of evidence, and also upon the nature and qualities of the different instruments of evidence, a more interesting branch of the subject, the application of these principles and instruments to the proof of issues generally and particularly, is now to be considered.

General
division.

It is to be recollected that every verdict is compounded of law and fact: of the facts, as ascertained by the finding of the jury; of the law, as expounded by the Judges, with relation to the evidence, and applied by the jury to the facts; and the trial is the process by which the facts are thus ascertained and the law applied.

In this proceeding it is the business of the parties to supply the necessary evidence; it is the province of the Court to pronounce on the legal effect of the evidence; and it is the duty of the jury to decide upon the facts, and to apply the law (*p*). Hence naturally result three distinct subjects for consideration: and first, as to the evidence to be supplied by the parties.

This branch of the division suggests two principal questions for inquiry: first, upon whom the proof of an issue or fact is incumbent; secondly, as to the nature, quality, and quantity of the evidence to be adduced, in general and in particular.

Onus pro-
bandi.

1st. Upon whom the proof is incumbent (*q*).

(*p*) Or by a special verdict to find the facts, so as to enable the Court afterwards to apply the law.

(*q*) The question who shall begin is not merely material as a rule of form and order but as regulating the right to reply. It is considered in practice, and perhaps with reason, that it gives a party an advantage to have the opening and reply, for the purpose of having the first and also the latest opportunity of making an impression on the jury. Much evidence no doubt is often sacrificed to their hearing the counsel; for a defendant is in general disinclined to give the opportunity for a reply which may disturb the arguments which he has used, and also because he may frequently doubt whether he can sufficiently depend on the evidence which he is required to state to the jury, without

having any opportunity of afterwards commenting on the variances between the facts as stated and proved. Notwithstanding the importance of the question whether the one party or the other has the right to begin, the decision of the point rests, at all events in the first instance, with the Judge at Nisi Prius, and it has been said that the Court above will not interfere with such a decision. See Phill. on Ev. Vol. I. 833. *Hare v. Nunn*, M. & M. 241. *Fowler v. Coster*, Ib. *Burrell v. Nicholson*, 6 C. & P. 202; 1 M. & R. 304. *Williams v. Davies*, 1 Cr. & M. 464. *Scott v. Lewis*, 7 C. & P. 347. But see *Huckman v. Fernie*, 3 M. & W. 517; where it was held that the right to begin is not so entirely at the disposal of the Judge at Nisi Prius but that the Court would interfere if his decision were clearly wrong.

Onus probandi.

The general rule upon the subject is that which natural reason and obvious convenience dictate; that the party who alleges the affirmative of any proposition shall prove it (*r*); for a negative does not admit of the simple and direct proof of which an affirmative is capable. And this is conformable with the maxim of the civil law, "*ei incumbit probatio qui dicit, non qui negat.*" The operation of this rule is to be determined not by the mere form but by the substance of the issue, for by a slight variation in the form of pleading the issue may be made either affirmative or negative at pleasure (*s*). The proof is obviously incumbent on the party who would fail if no evidence were to be given on either side (*t*). And therefore upon a penal action for sporting without a qualification, it is incumbent on the defendant to prove his qualification (*u*).

(*r*) B. N. P. 297. Vin. Ab. Ev. (S. a.) Litt. R. 36. Gilb. L. E. 148. *Probatio incumbit ei qui allegat negantis autem per rerum naturam nulla est probatio.* Dig. Lib. 22, tit. Probat. See *Catherwood v. Chabaud*, 1 B. & C. 150; where it was held, that a defendant, who pleaded an agreement between the plaintiffs and defendant, conditional on its being assented to by all the creditors of the defendant, was bound to prove the assent of all the creditors. On an agreement by defendant to pay 100*l.* if the plaintiff would not send herrings for one twelvemonth to the London market, and in particular to the house of *J. and A. M.*; the plaintiff proved he had sent no herrings during the twelvemonth to the house of *J. and A. M.*; held sufficient to entitle him to recover; no proof being given that he had sent herrings within that time to the London market. *Calder v. Rutherford*, 3 B. & B. 302. The question who ought to begin is obviously identical with the question who would be entitled to the verdict were no evidence to be given on either side. In the case of *Amos v. Hughes*, 1 M. & R. 464, Alderson, B. observed, that "Questions of this kind are not to be decided by simply ascertaining on which side the affirmative in point of form lies; the proper test is, which party would be successful if no evidence at all were given. In that case the declaration alleged a breach of contract is not embossing calico in a workmanlike manner, the plea, on which issue was

joined, alleged that the defendant did emboss the calico in a workmanlike manner. And it was held that the plaintiff ought to begin, for if no evidence were to be given on either side, the defendant would be entitled to the verdict, as it was not to be presumed that the work was badly executed. In replevin, or in other cases where the issue lies on the plaintiff, he is compelled to begin, *Curtis v. Wheeler*, 1 M. & M. 493. Where the plaintiff in his plea to cognizances stated facts amounting to *non-tenuit*, yet the affirmative being on him, it was held that he was entitled to begin, *Williams v. Thomas*, 4 C. & P. 234. Upon an action of trover, brought under an order of the Vice-Chancellor, to try the validity of a commission directing the finding, and conversion to be admitted, it was held that the plaintiff was nevertheless entitled to begin, *Turberville v. Patrick*, 4 C. & P. 557.

(*s*) See the observations of Lord Abinger in *Sewer v. Leggatt*, 7 C. & P. 613.

(*t*) *Amos v. Hughes*, 1 M. & R. 464, *supra*, note (*g*). *Mills v. Barber*, 1 M. & W. 427.

(*u*) See *R. v. Stone*, 1 East, 150, per Lord Mansfield; *Spiers v. Parker*, 1 T. R. 144; 1 B. & P. 468; 1 Burr. 148. 153; and it makes no difference whether the proceeding be by action, or by information before a magistrate. *R. v. Turner*, 5 M. & S. 206. See 1 East, 653; 1 Burr. 148. 153; 3 B. & P. 307. Where a party before a justice admits the trading

Upon a plea of set-off on a bond conditioned for the payment by the plaintiff of an annuity to a third person, the *onus probandi* is on the plaintiff (*x*).

In trespass, where the only plea consists of matter of justification alleging an act of bankruptcy to have been committed by the plaintiff, on which issue is joined, the proof is incumbent on the plaintiff (*y*).

On the plea of *plene administravit*, on which issue is joined, it is for the plaintiff to prove assets (*z*). So where all the issues were whether *A. B.* was of sound memory, the soundness of memory being alleged by the defendant, it was held that he was entitled to begin (*a*). So on a life insurance policy, where the plaintiff has to prove the life to have been insurable as a condition (*b*).

If the defendant by his plea impeach the consideration of a bill of exchange or promissory note on which an action is brought, the *onus probandi* lies on him, for the law presumes *primâ facie* that there was a good consideration (*c*).

In an action on a policy of insurance on goods, the plaintiff having proved a barratrous act on the part of the master, it was objected that it was incumbent on him also to prove that he was not the owner or freighter; but it was held that proof of the affirmative, if it were true, lay on the defendant (*d*).

It seems that the question as to the *onus probandi* depends on the issue joined, and is not affected by any inference to be drawn from a fact alleged but not denied (*e*).

as a hawker and pedlar, it is incumbent on him to prove that he had a licence. *R. v. Smith*, Burr. 1475. So on a charge of selling ale without a licence, *R. v. Harrison*, Paley on Conv. 45 (n.) 2d ed. In such a case the defendant suffers not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas, on the other hand, the prosecutor would be put to great inconvenience. Per Abbot, C. J. Ibid.

(*x*) *Penny v. Foy*, 8 B. & C. 11.

(*y*) *Cotton v. Thurland*, 1 M. & M. 273.

(*z*) Vol. II. tit. EXECUTOR. But see *The Dean and Chapter of Exeter v. Trevinnard*, Dyer, 80, pl. 53; Vin. Ab. tit. Ev. (S. a.) 1.

(*a*) *Tyrrell v. Holt*, 1 Barnard, 13 G. 1. Vin. Ab. Ev. 2, (S. a.) 7.

(*b*) *Rawlins v. Desborough*, 2 M. & R. 70. One counsel only on a side can be heard on a disputed claim who shall begin. Ibid.

(*c*) *Long v. Forrester*, 2 C. M. & R. 59. *Mills v. Oddy*, ibid. 103. *Easton v. Pritchett*, 1 C. M. & R. 798. *Mills v. Barber*, 1 M. & W. 427.

(*d*) *Ross v. Hunter*, 4 T. R. 33.

(*e*) In the case of *Edmonds v. Groves*, 2 M. & W. 642, which was an action by the indorsee against the maker of a promissory note, the defendant pleaded that the consideration for the note was money lost at gaming, that it was indorsed to the plaintiff with notice, and without consideration for the indorsement. The plaintiff replied that the note was indorsed to him without notice, and for a valuable consideration. At the trial, each party declining to give

Onus probandi.

The proof of an allegation of deficiency lies on the party who alleges it, although it imply a negative, for this is not to prove a mere negative, but to prove an actual relation in point of magnitude or value. Thus upon an issue, whether land assigned for payment of a legacy was deficient in value, it was held that the party who alleged that it was deficient was forced to prove it (*f*).

Where issue is taken on the amount which the plaintiff is entitled to receive, he is usually entitled to begin, for the excess beyond what is admitted constitutes that virtually claimed on the one hand and denied on the other (*g*).

It is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact, of which he is supposed to be cognizant (*h*). A defendant cannot set off cash-notes of the bankrupt in an action by the assignees, without proof that they came into his possession before the bankruptcy (*i*). A party who pleads his infancy must prove it (*k*). And where to a

any evidence, Lord Abinger directed a verdict for the plaintiff, giving the defendant liberty to move to enter a nonsuit. A motion was made on the ground that the replication admitted the original defect of consideration, and that therefore the onus was thrown on the plaintiff. Lord Abinger held, that as the fact of notice of the gaming transaction was involved in the issue, it was at all events incumbent on the defendant to prove that fact, in order to call on the plaintiff for proof of a new consideration. He declined to give any opinion upon the effect of an admission on the record upon the *onus probandi* of an issue already joined. Alderson, B. said that "an admission on the record is merely a waiver of requiring proof of those facts which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts proved like any others." In the above case, if the plaintiff took the note with notice of the original vice, as the defendant alleged, and seems clearly to have been bound to prove, no title could be gained, and consequently there could be no question as to any new consideration. Supposing, however, the question of new consideration to be material, *qu.* whether the *onus probandi* ought not to be deter-

mined by the actual allegation, and not upon the presumption that facts are true which the party taking issue on the allegation had it not in his power to deny. See Append. In covenant against a lessee, proof of the allegation that the defendant did not leave the premises well repaired at the end of the term is incumbent on the plaintiff.

(*f*) *Berty v. Dormer*, 12 Mod. 526. Where issue is upon the life or death of a person, the proof lies upon the party who asserts the death. *Wilson v. Hodges*, 2 East, 312. But where *A.* gave to *B.* a policy to receive 100*l.* if Saragossa were not in the hands of king Charles on such a day, Parker, C. J. held, that it lay on the defendant to prove that Saragossa was in the hands of king Charles on that day. See *Calder v. Rutherford*, 3 B. & B. 302.

(*g*) *Smart v. Rayner*, 6 C. & P. 721. *Harman v. Thompson*, 6 C. & P. 717. But it seems that the Court is to be satisfied that the plaintiff really intends to give evidence of a larger claim than that confessed on the record. *Ibid*.

(*h*) *Per Ashurst*, J. 6 T. R. 57; and see 9 Price, 257; 5 M. & S. 211; 4 B. & A. 140; 1 B. & C. 150; 3 B. & C. 342.

(*i*) *Dickson v. Evans*, 6 T. R. 57.

(*k*) *Berty v. Dormer*, 12 Mod. 526. *R. v. Turner*, 5 M. & S. 206.

plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time (*l*).

Onus probandi.

It is sufficient to prove a fact from which the rest of the affirmative allegation, in the absence of any other evidence, is a presumable consequence. Thus, upon an allegation that the plaintiff's goods were unlawfully seized, it is sufficient to prove a seizure of the goods, which, until the contrary appear, must be taken to be unlawful (*m*).

But where the negative involves a criminal omission by the party, and consequently where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed.

Where the negative involves a criminal omission.

And therefore, upon an information against Lord Halifax for refusing to deliver up the rolls of the Auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proof of the negative (*n*). In an action for putting combustible matter on board the plaintiff's ship, without giving notice of its contents, whereby the ship was destroyed, it was held that the plaintiff was bound to prove a negative which was essential to his case, viz. the want of notice (*o*). Thus also, in a suit for tithes in the Spiritual Court, where the defendant had pleaded that the plaintiff had not read the Thirty-nine Articles, the Court required him to prove the negative (*p*). So in *The King v. Hawkins*, where the objection, upon an information in the nature of a *quo warranto*, was, that the defendant had not taken the sacrament within a year, the Court held that the presumption was that he had conformed to the law (*q*). Where a woman, twelve months after her husband had

(*l*) *Borthwick v. Carruthers*, 1 T. R. 648; and so ruled by Holroyd, J. in *Bates v. Wells*, Lanc. Sp. Ass. 1822. Where the party charged with bigamy was an infant at the time of the first marriage, which was by license; and the register did not state any consent by parents or guardians, it was held that some evidence of consent should be given on the part of the prosecution. *Butler's Case*, Russ. & Ry. Cr. C. 61.

(*m*) *Aitcheran v. Maddock*, Peake's C. 102. And see *Evans v. Birch*, 3 Camp. 10; Vol. II. tit. PAYMENT.

(*n*) B. N. P. 208.

(*o*) *Williams v. The East India Company*, 3 East, 192.

(*p*) *Monke v. Butler*, 1 Roll. R. 83. See also *R. v. Rogers*, 2 Camp. 654. *Powell v. Millbank*, 2 Bl. R. 831. *Lord Halifax's Case*, B. N. P. 298. *R. v. Coombs*, Comb. 57.

(*q*) 10 East, 21, and per Bayley, J. *R. v. Twynning*, 2 B. & A. 388. Upon an indictment under the stat. 42 G. 3. c. 107, s. 1, which makes it felony to course deer in any inclosed ground without the consent of the owner, it was held, that it was necessary to prove the negative of a consent by the owner. *R. v. Rogers*, 2 Camp. C. 654. There the negative was part of the description of the offence. In the report of the above case, it seems to have been held necessary to negative the consent by

Where the negative involves a criminal omission.

last been heard of, married again, and the husband had never afterwards been heard of, upon the question as to the settlement of the children of the second marriage, the Court held that the justices had done right in presuming the legitimacy of the children, in the absence of any proof, except the usual presumption, that the first husband was living at the time of the second marriage (*r*).

Where the law presumes the affirmative.

So where the question arises, in a criminal case, whether the prisoner's examination was taken down in writing before the magistrate, under the statute it is incumbent on the prosecutor to give negative evidence to show that it was not taken down, for otherwise it will be presumed that the magistrate did his duty in taking the examination in writing, as the statute directs (*s*). And, in general, whenever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative (*t*). As where the law raises a presumption as to the continuance of life (*u*); the legitimacy of children born in wedlock (*x*); the satisfaction of a debt (*y*). And in general, where it has been shown that the case falls within the scope of any general principle or rule of law, or the provision of any statute, whether remedial or even penal, it then lies on the opposite party to show by evidence that the case falls within an exception or proviso (*z*).

Arguments of counsel.

A In civil, and now also in some criminal cases (*a*), the party, in addition to the evidence which he adduces (the *probatio inartificialis* of the Roman law (*b*),) is entitled to the aid of the comments and arguments of counsel, the *probatio artificialis*, as applied to the evidence in general. The counsel for the plaintiff

the testimony of the owner himself; it may however be doubted whether the only principle on which the absolute necessity for such evidence must rest, viz. that the best evidence ought to be given, would go to this extent. In an action for selling goods by auction in a place where the defendant was not a householder, some evidence of his not being such householder is essential.

(*r*) *R. v. Inh. of Twynning*, 2 B. & A. 386, and see *Butler's Case*, *supra*, 422. See Vol. II. tit. PRESUMPTIONS.—SETTLEMENT.

(*s*) See Vol. II. tit. ADMISSION.

(*t*) Gilb. L. Ev. 148, cited by Lord Ellenborough, 1 East, 200.

(*u*) Vol. II. tit. DEATH.—PEDIGREE.

(*x*) Vol. II. tit. BASTARDY.

(*y*) Vol. II. tit. PAYMENT.

(*z*) *Doe v. Bingham*, 4 B. & A. 672. *Doe v. Hawthorn*, 2 B. & A. 101. Where a plaintiff, for the purpose of avoiding a conveyance of land, has shown it to be for a charitable use, it lies on the defendant to bring himself within the exception. 2 B. & A. 101.

(*a*) i. e. in all cases of misdemeanor, and also cases of treason within the statute 7 W. 3, c. 3, s. 1.

(*b*) Quintil. L. 5, c. 8. According to the practice of the ancient Roman law, the advocate was entitled to make a perpetual running comment upon the testimony of the witnesses, and the documentary evidence as it was adduced. Formerly, in our own courts, the junior as well as the senior counsel addressed the jury; and the form is still preserved in trials for high treason.

has an opportunity for such comments in stating his case to the jury (c). When the plaintiff's case has been concluded, the defendant's counsel in his turn observes upon the evidence given, and also on that which he intends to adduce; and after the defendant has exhausted his evidence, the plaintiff's counsel replies. And thus each party has an opportunity of commenting upon the whole of the evidence. If the defendant's counsel merely comment on the plaintiff's case, and adduce no evidence (d), the plaintiff's counsel cannot reply, for he has already been heard. Where the plaintiff adduces fresh evidence in contradiction of some new facts stated by the defendant's witnesses (e), it is unnecessary to preface

(Arguments
of counsel.)

(c) The counsel for a plaintiff labours under a disadvantage in commenting upon his evidence before it has been given; it is frequently hazardous to lay much stress upon facts which afterwards may not be proved, and it not unfrequently happens that the proof varies so much from the statement as to render his comments and inferences irrelevant, and sometimes even injurious. The same observations apply to the defence, where the defendant calls witnesses: his counsel addresses the jury upon the case to be made out for the defendant, and upon the contradiction to be given to the plaintiff's witnesses hypothetically, upon the supposition that all which is stated will be proved; he stands therefore in a most precarious and hazardous situation with reference to the plaintiff's counsel, who is entitled to reply, and has the opportunity of commenting on the whole case, not conditionally and hypothetically, subject to the contingency that the very foundation on which his arguments rest may sink from under him, but with a full and certain knowledge of all the evidence in the cause. This practice not unfrequently induces a defendant's counsel to waive his defence by witnesses, and to rely on the infirmity of the plaintiff's case, rather than give his counsel the opportunity of replying. This is a practice attended with considerable inconvenience, inasmuch as it frequently excludes from the view of the Court and jury circumstances which might materially assist them in attaining to a correct conclusion in law and in fact.

(d) But if the defendant's counsel state facts which he proposes to prove, and after-

wards declines to call witnesses, the prevalent opinion seems to be, that the plaintiff's counsel is entitled to reply. *R. v. Bignold*, 1 Dow. & Ry. C. 59. *R. v. Horne*, 20 How. St. Tr. 662. *R. v. Carlisle*, 6 C. & P. 636. *Faith v. M'Intyre*, 7 C. & P. 44. There the counsel for the defendant having proved a document on cross-examination, read it as part of his speech, and Parke, B. intimated, that in point of good faith it ought to be put in, which was done, and the plaintiff's counsel replied. In the case of *Crerar v. Sodo*, 1 Mood. & Mal. C. 86, Lord Tenterden, C. J. held, that the allowing a reply in such a case was discretionary on the part of the Judge. An account-book having been put into the witness's hands to refresh his memory, the opposite counsel made observations as to the state in which it was kept; held not to give a right of reply. *Pullen v. White*, 3 C. & P. 434.

(e) A plaintiff may, it seems, give evidence in reply in order to negative a specific fact sworn to by the defendant's witnesses, the proof of which he could not be expected to have anticipated, but he cannot be allowed to adduce evidence which he might have given in the first instance. Action for the amount of a builder's bill; the defence was that the charges were too high; the defendant called surveyors, who said they considered them 100*l.* too high; and the plaintiff offered a letter on the part of the defendant by his attorney, some time before, complaining that the defendant's surveyor thought the charges 60*l.* too much: held that it was not properly evidence in reply. *Knapp v. Haskall*, 4 C. & P. 590.

Arguments
of counsel,

such evidence by observations ; for after the defendant's counsel has observed upon the evidence in contradiction, the plaintiff's counsel is entitled to a general reply. And in such case the defendant's counsel is not entitled to reason upon the whole of the evidence, but on the subject of contradiction only, having already made his observations on the supposition that his witnesses would be believed, and his case established.

Order of
proof
where
there are
several
issues.

Where the defendants in ejectment appeared by separate attorneys and counsel, it was held that only one counsel could address the jury where they supported the same title (*f*).

Where one of two defendants in trover appeared by counsel, and the other in person ; it was held, that the defence being joint and by one attorney, the counsel only could address the jury, but the party might cross-examine the witnesses (*g*).

Where there are several issues, the proof of some being incumbent on the plaintiff, and of others on the defendant, it is usual for the plaintiff to begin (*h*), and to prove those which are essential to his case, and then the defendant does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs ; the defendant's counsel is entitled to a reply upon such evidence, in support of his own affirmatives, and the plaintiff's counsel to a general reply. Where, however, there are issues involving different transactions, the proof of one of which is incumbent on the plaintiff, and the proof of the other is incumbent on the defendant, some difference has obtained in practice (*i*), on the question whether the plaintiff be bound to go into evidence, as part of his own case, to negative the defendant's case, as well as affirmatively to establish his own. According to the later authorities he is not bound to enter on any such negative evidence in the first instance, but may waive his proof until the defendant has exhausted his affirmative evidence in support of his own case. But it is also laid down, that if the plaintiff elect to enter at all into such negative evidence in the first instance, he

(*f*) *Doe v. Tindale*, 3 C. & P. 565.

(*g*) *Perring v. Tucker and another*, 1 M. & M. 491 ; and 4 C. & P. 70.

(*h*) *Jones v. Salter*, 1 M. & R. 501. *Curtis v. Wheeler*, M. & M. 493. *Williams v. Thomas*, 4 C. & P. 234.

(*i*) See *Rees v. Smith*, 2 Starkie's C. 31, where in an action of trespass, *q. c. f. &c.*, to which the defendant had pleaded the general issue, and pleas of justification, Lord Ellenborough stated the rule to be,

that where by pleading or by reason of notice the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts. And his lordship held the same doctrine in the case of bills of exchange, where notice had been given of the intention to dispute the consideration. *Delaney v. Mitchell*, 1 Starkie's C. 499. See also *Spooner v. Gardiner*, 1 R. & M. C. 84.

must then produce the whole of that evidence, and that he cannot in such case be permitted to adduce negative evidence generally in reply. Where to a declaration for a libel the defendant pleaded the general issue, and several pleas of justification, it was held that the plaintiff might if he chose go into evidence in the first instance to negative the plea of justification, but that he could not go into part of such evidence in the first instance, and adduce the remainder in reply to the defendant's case (*k*). Where there is but one transaction for inquiry, the plaintiff cannot split his case, and go into part in the first instance, and reserve the remainder by way of reply, although there be in fact several issues, as where in an action of assault and battery the defendant pleads not guilty, and *son assault demesne*; yet, if in fact the defence consist of distinct collateral matter, the negative of which requires no proof from the plaintiff in the first instance, it seems, that although the plaintiff had notice of the defence intended to be set up, it is not necessary to go into any evidence in answer to that defence, until the defendant has, by his proof, called upon him for a reply; this appears to be a matter of practical convenience, subject to the discretion of the Court (*l*). It is possible that the defendant may not be able to establish any case, and thus time may be saved by postponing the plaintiff's reply; besides, until the defendant has adduced such evidence, it cannot be known with any certainty to what points the plaintiff is to adduce his evidence in reply.

Order of proof where there are several issues.

Where the lessor of the plaintiff claimed as heir-at-law, and the defendant as devisee, and the plaintiff proved his pedigree and closed his case, and the defendant opened a new case, which the plaintiff answered by evidence; it was held, that the defendant was entitled to the general reply (*m*). From the report of this

(*k*) *Brown v. Murray*, 1 R. & M. 254, cor. Lord Tenterden, C. J. His Lordship had previously ruled to the same effect in *Sylvester v. Hall*, Sitt. after Trin. July 1825; where, to an action for trespass and false imprisonment, the defendant had pleaded the general issue, and also several pleas in justification. Parke, J. ruled accordingly in *Roe v. Day*, 7 C. & P. 707.

(*l*) Lord Tenterden, C. J. adopted this course, and allowed a plaintiff to give evidence, in answer to a defence in an action on a bill, that there was no consideration, after notice of the intended defence. Sitt.

after Hil. 1820, at Westminster; provided no suspicion has been cast on the plaintiff's title by cross-examination of the plaintiff's witnesses. 1 R. & M. 255. Chitty on Bills, 6th ed. 401. See Vol. II. tit. BILLS OF EXCHANGE. *Spooner v. Gardiner*, 1 R. & M. 84. Lord Ellenborough usually required the plaintiff under such circumstances to go at once into the whole of his case.

(*m*) *Goodtitle d. Revett v. Braham*, on a trial at bar; 4 T. R. 497. But where the plaintiff in such a case is put to proof of his pedigree, it seems to be clear that he may, at his election, go into proof to con-

Order of
proof.

case it appears that the whole case went to the jury on the defendant's title as devisee; the lessor's title as heir being admitted. The title being once admitted, the effect as to the order of proof seems to be the same as if it had not been disputed at all; and consequently the whole issue lying upon the defendant, he would be in the same situation with a plaintiff in ordinary cases. And in general, where the proof lies upon the defendant alone, the order of proof is reversed, and his counsel is entitled to a reply. As where the lessor of the plaintiff in ejectment claims under a will, and the defendant claiming under a codicil, admits the will (*n*). Or where, in ejectment, the lessor of the plaintiff claiming as heir-at-law, the defendant who claims under a will admits the heirship (*o*). Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which, again, the plaintiff controverts by evidence, it seems that the defendant is entitled to a reply by counsel, confined to the new case set up by him; for upon that relied upon by the plaintiff, his counsel has already commented on the opening of the defendant's case; and that the plaintiff is entitled to a general reply.

Onus probandi, damages.

It seems formerly to have been considered that the defendant was in all cases entitled to begin, where the *onus probandi* lay upon him, notwithstanding the technical form of the pleadings, and although the proof of the amount of his damages lay upon the plaintiff.

Where in an action of trespass *quare clausum fregit*, the defen-

trovert the defendant's supposed case, and he would then be entitled to the general reply.

(*n*) *Doe d. Corbett v. Corbett*, 3 Camp. 568.

(*o*) *Fenn v. Johnson*, cited 1 M. & M. 168 (*n*). Adams on Eject. 2d edit. 256, *n*., where Le Blanc, J. and Wood, B. so ruled on different occasions. But on another occasion, Gibbs, J. held, that the admission did not give the defendant the right to begin. Where each party claimed as heir-at-law, and the defendant, if legitimate, was clearly heir, it was held, (by Vaughan, B.) that an admission by him, that unless he were legitimate, the lessor of the plaintiff was the heir-at-law, did not entitle the defendant to begin. *Doe v. Bray*, 1 M. & M. 106. In the case of *Doe v. Barnes*, 1 M. & R. 386, Sophia Richards, the sister and heiress of John

Clavell, took possession of premises of which he died seised, the lessors were her devisee of the premises and her heir-at-law, who was also heir-at-law of John Clavell. Lord Denman ruled that the defendant admitting those facts, and that the plaintiff was entitled to the property, unless he the defendant proved the will of John Clavell, was entitled to begin. Where in ejectment by the heir-at-law to recover premises conveyed by the deceased ancestor under a deed which was impeached on the ground of his incapacity at the time of execution, held that as the seisin of the ancestor at the time of his death was not admitted, the mere admission of the lessor's title as heir by pedigree, did not entitle the defendant to begin. *Doe v. Tucker*, 1 M. & M. 536. In *Doe v. Smart*, 1 M. & R. 476.

dant, as to the force and arms, and whatever is against the peace, &c. pleaded not guilty; and as to the residue, pleaded a justification under a right of way, the defendant was held to be entitled to begin and to reply (*p*). Justification.

So in an action for a libel, where the only pleas were pleas alleging facts in justification, on which issues were joined (*q*). Or trespass, where the only plea consisted of matter of justification, alleging an act of bankruptcy to have been committed by the plaintiff, on which issue is joined.

A different rule has since been stated as a resolution of the Judges. In one report (*r*), *Tindal*, L. C. J., is stated to have expressed himself as follows: "The Judges have come to a resolution, that justice would be better administered by altering the rule of practice, and that in future the plaintiff should begin in all actions for personal injuries, and also in actions for libel and slander, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. It is most reasonable that the plaintiff who brings his case into Court, should be heard first to establish his complaint (*s*)."
It appears, however, from later decisions that the rule is to be confined to actions for personal or malicious injuries (*t*), such as assaults, libel and slander (*u*), malicious prosecution, and the like (*w*). It is not sufficient to bring a case within the rule, that the amount claimed should be unliquidated (*x*), as in an action of covenant to recover damages for a breach of contract (*y*), or trespass to land or goods (*z*), or, as it seems, in an action of

(*p*) *Jackson v. Hesheth*, 2 Starkie's C. 520, per Wood, B. and Bayley, J.; the general issue had been pleaded originally, but had been withdrawn during the assizes (the cause was in the county palatine court), for the purpose of giving the defendant's counsel a right to reply. So in *Hodges v. Holder*, 3 Camp. C. 366. *Cottin v. James*, Mood. & M. 270; 3 C. & P. 605. And these decisions do not appear to be affected by the new rule mentioned below.

(*q*) *Cooper v. Wakley*, 1 Mood. & M. C. 248. So in *Barell v. Russell*, 1 R. & M. 293. Where, to an action of battery the defendant justified as captain of a ship in which the plaintiff was mariner, and on issue joined on the plea of *de injuria*, it was held that the defendant was entitled to begin.

(*r*) *Carter v. Jones*, 6 C. & P. 641.

(*s*) In the report of the same case in 1 M. & R. 281, the rule is stated thus,

"A resolution has lately been come to by all the Judges that in case of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant."

(*t*) In *Wooton v. Barton*, 1 M. & R. 518, Parke, B. said that the only rule laid down by the Judges was, that in actions for personal injuries where damages are sought, as in actions of assault, libel, and slander, the plaintiff should begin. And see *Reeve v. Underhill*, 6 C. & P. 773.

(*u*) *Ibid*.

(*w*) *Atkinson v. Warne*, 6 C. & P. 687.

(*x*) *Reeve v. Underhill*, 6 C. & P. 773. *Lewis v. Wells*, 7 C. & P. 221. *Wooton v. Barton*, 1 M. & R. 518.

(*y*) *Reeve v. Underhill*, 6 C. & P. 773.

(*z*) *Burrell v. Nicholson*, 6 C. & P. 202.

Justification.

trover (*a*). But the rule has been held to apply to an action for breach of promise of marriage (*b*), an action of contract in substance as well as in form. The rule has been applied also to issue taken on pleas in abatement (*c*).

Appeal.

Upon an appeal against an order of removal it is incumbent on the respondents to prove their case, by establishing a settlement in the appellant's parish. Upon an appeal against a poor's-rate, on the ground that the appellant has no rateable property within the parish, the *onus* is on the respondents to prove that he has such property (*d*) there; but if the appellant object merely to the quantum of the rate, he is to prove the inequality of such rate (*e*). Upon an appeal against an order of bastardy, the respondents must begin (*f*).

It lies on a defendant who seeks to bring a plaintiff within an Act which, if the defendant resided within a particular district, subjects the plaintiff to a nonsuit, to prove his residence at the time of the action brought, by particular evidence of the fact; general evidence of recent residence there is not sufficient (*g*).

Where there are several issues on pleas by different defendants, and where one will decide the whole case, but the other will not, the former ought to be tried first. As where one pleads in abatement, and the other pleads to the action (*h*); or where one pleads to the action, and the other a matter personal to himself (*i*); or where in trespass one pleads a release, the other not guilty, or a justification (*k*). Where there are many issues the Court will at discretion order them to be tried separately (*l*).

(*a*) See *Scott v. Lewis*, 7 C. & P. 347.

(*b*) *Harrison v. Gould*, 7 C. & P. 580.
Reeve v. Underhill, 6 C. & P. 773.

(*c*) See Vol. II. tit. ABATEMENT. In *Fowler v. Coster*, 1 M. & M. 241, and 3 C. & P. 463, Lord Tenterden held, that wherever it appears on the record or from the statement of counsel that there is no real dispute as to the sum to be recovered, but the damages are either nominal or mere matter of computation, then if the affirmative of the issue is on the defendant, he is entitled to begin; where, therefore, to an action on bills of exchange there was a plea of abatement of the non-joinder of others, it was held that the defendant ought to begin.

(*d*) 4 T. R. 475.

(*e*) *Ibid*.

(*f*) *R. v. Knill*, 12 East, 50.

(*g*) *Jones v. Kenrick*, 8 B. & C. 337.

(*h*) 1 Inst. 125; Bro. Trial, pl. 1, pl. 48; 2 Rol. Ab. 627; Bac. Ab. Trial, K. But in a real action, where one pleads a plea which extends only to himself, and the other pleads a plea to the action, as that the plaintiff is a bastard, it is immaterial which is tried first, for the trial of one does not dispense with the necessity of trying the other. *Ibid*.

(*i*) 1 Inst. 124; 2 Rol. 628, pl. 7.

(*k*) *Ib*. And it is said that if one plead a plea which extends only to himself, on

(*l*) *Kemp v. Mackerill*, Sayer, 131.

Since the passing of the Prisoners' Counsel Bill, the following Appeal.
rules of practice have been laid down by twelve of the Judges :—

1. That where a witness for the Crown has made a deposition before a magistrate, he cannot upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court, and his former deposition, after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply, and in case the counsel for the prisoner comments upon any supposed variance or contradiction without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot in cross-examination be compelled to answer whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears, that it contains no mention of such statement; in that event the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such a statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

4. If the only evidence called on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not; cases may occur in which it may be fit and proper so to do.

5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent

one day, and the other a plea which extends only to himself, on a subsequent day, it shall be intended that the first was first

pleaded, and it shall be tried first. Bro. Trial, pl. 48; Bac. Ab. Trial, K.

them, are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner.

Statement
of counsel
as to the
cause of
action.

A plaintiff is not precluded from recovering on any demand to which he shows himself to be legally entitled, by the allegations on the record and the evidence, although his counsel may not, in opening his case to the jury, have insisted on that demand. Thus, in an action on a policy of insurance with the money counts, where the defendant showed that the risk had never commenced, it was held that the plaintiff was entitled to a return of the premium, although no claim had been made to it originally by his counsel (*m*).

It seems to be discretionary in the Judge, whether, after the plaintiff has closed his case, and the defendant's counsel has commenced his address to the jury, the plaintiff's counsel can be allowed to go into a new case (*n*). In a penal action the Court will not permit a defect in the plaintiff's case to be supplied, unless it has arisen merely from inadvertence on the part of the plaintiff's counsel (*o*).

Evidence
must be
relevant.

2dly. As to the *nature, quality, and quantity*, of the evidence to be adduced by the parties (*p*).

In the first place, with respect to the *nature* of the evidence ; as the business of trial is to ascertain the truth of the allegations put in issue, no evidence is admissible which does not tend to prove or disprove the issue joined.

Thus, in an action of trespass for a battery, the defendant cannot, under the general issue, prove that the plaintiff committed the first assault, for that is not the issue (*q*).

Must cor-
respond
with the
allegations.

And as one of the main objects of pleading is to apprise the adversary of the nature of the evidence to be adduced against him, it is essential to the purposes of substantial justice that such allegations should be supported by corresponding proof. And therefore, in general, every material and essential allegation, and every circumstance descriptive of the identity of anything so alleged, must be proved as averred.

The same reasons which require the cause of action or of criminal charge to be stated upon the record, require also that the allegations shall be proved ; mere assertion, without corresponding proof, would be nugatory. And as such allegations and proofs are

(*m*) *Penson v. Lee*, 2 B. & P. 230.

(*n*) *Per Le Blanc, J.*, 1 East, 614.

(*o*) *Aldred v. Halliwell*, 1 Starkie's C. 117 ; *cor. Lord Ellenborough*.

(*p*) The nature of the evidence essential

to the proof of particular issues will be considered at large in Vol. II.

(*q*) See Vol. II. tit. TRESPASS, and tit. COLLATERAL FACTS.

to answer certain legal purposes it necessarily follows that it is always for the Court to pronounce whether the facts proved satisfy the allegations on the record.

As questions of variance are of daily occurrence, it may not be improper, before the decisions on the subject are noticed, to enter into a brief consideration of the principles upon which the doctrine is founded. With respect to the proof of the facts and circumstances alleged, three predicaments may occur: they are either all proved as alleged, or none of them are proved; or part are proved wholly or partially, and the rest are either not proved, or absolutely disproved or negatived. The last of these predicaments is of course the only one which can afford ground for discussion. General principles.

Now, considering that all human affairs and dealings are connected together by innumerable links and circumstances, forming one vast context, without any chasm or interruption, and undistinguished by the artificial boundaries and definitions of right and wrong prescribed by the law, it is in the nature of things impossible that a transaction detailed upon the record can be identical with the one proved, if the proof vary in the slightest particular, be it in its own nature ever so insignificant.

An act done at one day or place cannot be the same with an act done on another day, or at a different place; a robbery, where ten sovereigns were stolen, cannot be the same with a robbery where nine only were taken. It is easy, therefore, to see that to require this, as it were, *natural and absolute* identity of the allegations and proofs, would be, at the least, highly inconvenient, if not wholly impracticable. Hence it is, that an artificial and *legal identity*, as contradistinguished from a *natural identity*, must be resorted to as the proper test of variance; that is, it is sufficient if the proofs correspond with the allegations, in respect of those facts and circumstances which are, *in point of law*, essential to the charge or claim. The rules which govern the connexion between the allegations and evidence must obviously result immediately from the principles which regulate the allegations themselves.

By the rules of law, specific remedies or punishments are annexed as incidents to certain defined combinations of circumstances. And in order to the practical application of such remedial and prohibitory definitions, it is necessary that the facts and circumstances of each individual case, corresponding with the legal definition, but amplified and particularized according to certain technical legal rules, should be detailed upon the record. And this principally with a view to the following objects: *first*, to apprise the defendant of the specific nature of the claim or charge which

General
principles.

is made against him ; and *secondly*, to enable the Court to adjudge whether the circumstances stated fall within any remedial or prohibitory law, and to pronounce the proper judgment if the facts alleged be established ; and *thirdly*, to enable the parties to avail themselves of the verdict and judgment, should the same rights or liabilities be again discussed. When, therefore, in addition to the facts which are essential to the claim or charge, others are alleged which are wholly redundant and useless, the legal maxim applies, "*utile per inutile non vitiatur*;" and as the law did not require the superfluous circumstances to be alleged, so, although they have been improvidently stated, the law in furtherance of its object rejects them, as mere surplusage, and no more regards them for the purposes of proof than if they had not been alleged at all.

Mere sur-
plusage.

It would be nugatory to require proof of allegations which are wholly impertinent ; the identity of those allegations which are essential to the claim or charge, with the proofs, is all that is material.

Thus, if it were alleged that *A.*, being armed with a bludgeon, and disguised with a visor, feloniously stole, took and carried away the watch of *B.*, the allegations that *A.* was armed and disguised, being altogether foreign to a charge of larceny, would be wholly rejected, and would require no proof on the trial (*r*).

Partial
proof.

The same principle extends much further : it frequently happens that the evidence fails to prove circumstances not altogether impertinent, but which merely affect the *magnitude* or *extent* of the claim or charge ; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence fail to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the *extent* to which it is proved. The principles which require the cause of action or ground of offence to be stated, are satisfied : the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him ; and the Court is enabled to pronounce on the legal effect of the part which is established as true by the verdict of the jury, and the record shows the real nature and extent of the right or liability established.

Thus, if *A.* be charged with feloniously killing *B.* of malice, premeditation, and all but the fact of malice premeditation be proved, *A.* may clearly be convicted of manslaughter, for the indictment

contains all the allegations essential to that charge; A. is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. Partial proof.

The same principle applies to allegations of number, quantity and magnitude, where the proof, *pro tanto*, supports the claim or charge. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five; for when it is proved that he stole five, evidence is not admitted of a different offence from that charged, but of the same in legal essence, differing only in quantity, and constituting, therefore, a *natural*, but no *legal* variance; no evidence is received which is not warranted by the allegations, and the party may afterwards plead his conviction or acquittal notwithstanding the variance as to number.

But the doctrine as to the sufficiency of partial proof assumes that the evidence, so far as it extends, agrees with the allegations legally essential to the charge or claim; that is, that what is proved is part of what is alleged, and differs only in quantity or extent. Where an allegation is rejected *in toto*, it is assumed that the allegations are divisible, and that the averment in question may be so rejected, without destroying the *legal identity* of the charge or claim.

It is a most general rule that no allegation which is *descriptive* of the *identity* of that which is legally essential to the claim or charge, can ever be rejected. Were it otherwise, and if proof could be admitted which varied from the record, in consequence of the omission to prove any allegation descriptive of an essential particular, it is plain that the proof would no longer agree with the cause of action, or charge alleged, to *any extent*; they would differ throughout in respect of that descriptive allegation; and as the proof would be more general than the allegations, it would no longer be partial proof of the same charge or claim, but of a different and more general one. As an absolute and *natural* identity of the claim or charge alleged, with that proved, consists in the agreement between them in *all* particulars, so their *legal* identity consists in their agreement in all the particulars *legally* essential to support the charge or claim; and the identity of those particulars depends wholly on the proof of the allegations and circumstances by which they are ascertained, limited and described. To reject any allegation *descriptive* of that which is essential to the charge or claim would obviously tend to mislead the adversary. The Court, in giving judgment on a general ver- Descriptive allegation.

Partial
proof.
Descriptive
allegations.

dict, could never be sure that those facts had been proved which were essential to support their judgment; and the record would afford but very uncertain evidence as to identity, should the same matter be again litigated. For instance, if in an action for breaking the plaintiff's close, he were to describe it as abutting on the several closes *A.*, *B.*, *C.* and *D.*, these would all be allegations descriptive of that which was material, that is, of the subject-matter to which the injury was done, and a variance from any one would be fatal(s); for if the allegation that the *locus in quo* abutted on the close *A.* could be rejected as immaterial, the other abutments might also be disregarded. Evidence would then be admitted of a trespass in an entirely different close; the defendant might come prepared to rebut the charge of trespass, as far as regarded the close described, but be wholly unprepared to justify an entry into any other close; and the record would afford no evidence, or, what is worse, might mislead, in case of future litigation between the same parties. So if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected: to admit evidence that he stole a *white* one would not be to prove a *part* of that alleged, but to prove an offence in respect of a subject-matter proved to be different.

The very omission to prove the boundaries in the former case, or the colour in the latter, would be fatal, although different boundaries, or different colour, should not be proved; for neither the trespass nor the larceny proved could be considered to be the same with that alleged, until the allegations descriptive of identity were proved, that is, whilst the proof was general, but the description special; for so long it would be possible that the subject-matter proved was wholly different from that alleged (*t*).

It seems, indeed, to be an universal rule, that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which, in point of description, limitation and extent, he has prescribed for himself; he selects his own terms, in order to express the nature and extent of his charge or claim; he cannot, therefore, justly complain that he is limited by them; to allow him to exceed them would, for the reasons adverted to, be productive of the greatest inconvenience.

(s) *Supra*, tit. TRESPASS; 2 East, 500.

(t) It is otherwise where the subject-matter is identified and ascertained independently of the additional description, or where the additional description is not essential to the identity of the subject-

matter described; as if it were alleged that *C. D.* robbed or assaulted *A. B.*, wearing a black coat. See *Draper v. Garratt*, 2 B. & C. 2. *Stoddart v. Palmer*, 3 B. & C. 2.

As no allegation, therefore, which is *descriptive* of any fact or matter which is *legally essential* to the claim or charge, can be rejected altogether, inasmuch as the variance destroys the *legal identity* of the claim or charge alleged with that which is proved; upon the same principle, no allegation can be proved partially, in respect of extent or magnitude, where the *precise extent or magnitude* is in its nature descriptive of the charge or claim.

Partial
proof.
Descriptive
allegations.

If in an action or indictment for a nuisance, the wrong be alleged to have been continued for twelve months, and proof be given that it has been continued for one month only, the variance would be immaterial, except so far as regarded the damages or punishment; for the injury or offence would in point of law be the same, whether continued for one month or for twelve; the only difference would be in point of duration.

But if a contract were to be alleged to serve for twelve months for the sum of 12*l.*, and proof were to be given of a contract to serve for one month for the sum of 1*l.*, the variance would be fatal; the precise time, as well as the precise sum, being essential to the contract, and descriptive of the ground of claim. For although a nuisance continued for twelve months be an offence made up of the continuance for each of the several months which make up the twelve, a contract to serve for twelve months for 12*l.* is not made up of twelve contracts to serve for a month for 1*l.* each month, but each is separate and distinct in point of law.

The same observations apply to prescriptions, and all other cases where precise quantities, sums, duration or extent, are in point of law essential to the identity of an entire subject-matter, and descriptive of it.

Again, as the description of facts upon the record must necessarily be finite and limited, whilst the detail of those facts in evidence must usually be attended with a multitude of particular circumstances connected with them, it is perfectly clear that whatever minuteness of description may be requisite in stating the claim or charge upon the record, the evidence to prove those allegations must usually be still more particular and circumstantial, and consequently that the proof of more particulars than are alleged can never be material, provided such additional particulars consist with those which are alleged. The generality of the allegations may indeed constitute a vice in the record itself, but it never gives rise to the objection of variance from the evidence, unless the subject be of so entire a nature that the matter proved,

Redundant
proof.

Redundant proof. but not alleged, is inconsistent with that which is alleged, and disproves it altogether.

If a man were charged with stealing a horse, the property of *John Doe*, generally, it would be no objection that on the evidence it appeared that there were two persons of that name, the elder and the younger; for if he stole the horse of either, the allegation would be true. But if he were to be charged with stealing the horse of *John Doe*, and it turned out that the horse was the property of *John Doe* and *James Doe*, the variance would be fatal; for the interest of *James Doe*, thus proved, but not alleged, would show that the ownership was misdescribed altogether.

General inference. The general result of these principles and inferences seems to be, that in the case of *redundant allegations*, it is sufficient to prove *part* of what is alleged, according to its *legal effect*, *provided* that that which is alleged, but not proved, be neither *essential* to the charge or claim (*u*), nor *describe or limit* that which is essential (*v*); and provided also, that the facts proved be alone sufficient in law to support the charge or claim. And that *redundancy of proof* will not be material, unless that which is proved, but not alleged, *contradict or disprove* that which is alleged.

Surplusage. In the first place, it seems that the omission to prove circumstances which are alleged, but are not essential to the claim or charge, which are mere surplusage, and might have been wholly omitted, or are merely cumulative, or which operate merely in aggravation, or affect merely the extent of damages, is not material, provided the circumstances so rejected do not operate by way of description of others which are material.

It is a general rule, that whenever an averment may be *wholly rejected* without prejudice to the charge or claim (*w*), proof is unnecessary.

Thus, where a declaration for an injury to the plaintiff's reversionary interest in land, alleged that the premises were, at the time of the injury, and *still were*, in the occupation of *A. B.*, whereas the occupation of *A. B.* had ceased previous to the commencement of the action, the variance was held to be immaterial, the possession of *A. B.* as tenant at the time of the injury being pro-

(*u*) Per Abbott, C. J., 3 B. & C. 122: "It is a general rule that a variance between the allegation and proof will not defeat a party, unless it be in respect of matter which if pleaded would be material."

(*v*) See the observations of Abbott, C. J. 2 B. & A. 363.

(*w*) See the observations of Lawrence, J. in *Williamson v. Allison*, 11 East, 452, and of Lord Tenterden, 3 B. & C. 122. The rule is of course otherwise where the averment cannot be wholly rejected without also rejecting something essential to the action.

perly described (x). But where in an action on the case for an injury to the reversion, the plaintiff alleged that the house was in the possession and occupation of a certain tenant thereof under the plaintiff; and the evidence was that the plaintiff was seised in fee for the use of the inhabitants of a particular parish, and that the house was occupied by paupers, under the superintendence of a person appointed by the parish; the variance was held to be fatal, for neither the poor nor the superintendent could be considered as tenants to the plaintiff (y).

Where the plaintiff, in an action for breach of a warranty in selling goods unfit for sale, alleged in his declaration that the defendants *knew* the goods to be unfit for sale, it was held that the allegation of knowledge, being immaterial, need not be proved (z).

An averment, in an action by an indorsee against the indorser of a bill of exchange dishonoured on presentment for payment, that the bill was accepted by the drawee, need not be proved (a).

In an action against a sheriff for taking insufficient sureties on a replevin-bond, it was alleged that the party replevying levied his plaint at the next county court, to wit, at the county court holden on, &c. before A., B., C., &c. suitors of the court; the evidence was of a plaint levied at a court holden before E., F., G., &c., and held to be sufficient; for the allegation that the court was held before A., B., C., &c. was *immaterial*, and might have been altogether omitted (b).

So where an indictment alleged a robbery to have been committed in the dwelling-house of A. B., it was held that a variance as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-house (c). So if arson be alleged to have been committed in the night-time (d).

If an offence at common law be laid to have been committed against the form of the statute, the allegation may be rejected (e).

Where the plaintiff alleged, that before the publication of a libel by the defendant, the plaintiff's carriage came in contact with a carriage in which E. S. was riding, and that the accident

(x) *Vowles v. Miller*, 3 Taunt. 137.

(y) *Martin v. Goble*, 1 Camp. 320.

(z) *Williamson v. Allison*, 11 East, 452.

See also *Broomfield v. Jones*, 4 B. & C. 480.

(a) *Tunner v. Bean*, 4 B. & C. 312.

(b) *Draper v. Garratt*, 2 B. & C. 2.

And note, that it was observed by all the

Judges that the allegation was under a *scilicet*.

(c) *Pye's case*, East's E. P. C. 785; *Johnston's case*, *ibid.* 786.

(d) *R. v. Minton*, East's P. C. 1021.

(e) 5 T. R. 162; 4 T. R. 202; 1 Saund. 135, n. 3.

Surplusage. happened without any default on the part of the plaintiff, and then alleged a publication of a libel of and concerning the accident; and upon the evidence it appeared that the accident did happen through the default of the plaintiff; it was held to be no variance so as to bar the plaintiff from recovering as to part of the libel not justified, the allegations being divisible, and the averment that the accident happened without the plaintiff's default being an immaterial circumstance (*f*).

Where an intention to deceive is unnecessarily alleged in an indictment, it may be rejected (*g*).

Cumulative allegations. So where allegations are merely *cumulative*. In an action for words it is sufficient to prove so much of the words laid in any one count as are actionable (*h*).

Where an information for a seditious libel alleged that outrages had been committed in and in the neighbourhood of Nottingham, it was held the allegation was divisible, and that it was sufficient to prove that outrages had been committed 14 or 15 miles from Nottingham (*i*).

Proof of part.

Where an indictment charges a defendant with composing, printing and publishing a libel, he may be found guilty of the printing and publishing only (*k*).

If an indictment for treason charge several overt acts, it is sufficient to prove one (*l*).

On an indictment for feloniously forging and causing to be forged, the prisoner may be convicted of either.

Where a declaration under the Bribery Act alleged that the bribe was to induce *White* to vote for Mr. *Lockyer* and Lord *Egmont*, it was held to be sufficient to prove that the bribe was to give his vote for Mr. *Lockyer* (*m*).

In an action by the husband for a malicious prosecution of the husband and wife, the plaintiff is entitled to recover in respect of a malicious prosecution of the wife (*n*).

(*f*) *Lord Churchill v. Hunt*, 2 B. & A. 685.

(*g*) *R. v. Jones*, 2 B. & Ad. 211. On an indictment for a nuisance, an allegation that the defendant was bound *ratione tenure* to repair a house adjoining to a public road which was in a ruinous state, dangerous to passengers is mere surplusage. *R. v. Watts*, 1 Salk. 357.

(*h*) *Compagnon v. Martin*, Bl. 794. *R. v. Drake*, Salk. 660; Dy. 75; Hardr. 470. *Flower v. Pealey*, 2 Esp. C. 491. *Secus*, where the words alleged, but not

proved at all, qualify those which are proved. So on the trial of an individual for obtaining money by false pretences, it is sufficient to prove an obtaining by part of the pretences charged. *R. v. Hill*, Russ. & Ry. C. C. 190.

(*i*) *R. v. Sutton*, 4 M. & S. 532.

(*k*) *R. v. Williams*, 2 Camp. 507. *R. v. Hunt*, ib. 583; 2 East's P. C. 515, 516.

(*l*) Fost. 194.

(*m*) *Coombe v. Pitt*, 3 Burr. 1586.

(*n*) *Smith v. Hixon*, Str. 977.

In an action against the sheriff for suffering the husband and wife to escape upon an execution founded on a debt due from the wife before coverture, the plaintiff is entitled to recover, on proof that the husband alone was taken in execution, and suffered to escape (o). Proof of part.

If a plea allege two matters, either of which amounts to a justification in trespass, it is sufficient to prove one, though the whole be put in issue by the general plea of *de injuriâ* (p).

If the defendant avow for rent and a *nomine pænæ* together, without alleging any demand of rent, the avowry is good for the rent, though it be ill for the penalty (q).

If the replication to a plea of tender allege a subsequent demand of that sum, proof of the demand of a larger sum will not be sufficient (r).

And not only may merely useless and cumulative averments be rejected, but so also may averments which are material by way of *aggravation*, provided they be not essential to support the charge or claim, or describe or limit that which is essential. As in civil cases, where matters are alleged in aggravation of trespass or slander, or other ground of action. Aggravation.

Thus, if in trespass *quare clausum fregit*, the plaintiff allege that the defendant is an inferior tradesman or dissolute person, although he fail in the proof, he is still entitled to damages for the trespass (s).

So on indictments for special and aggravated offences, including more general ones, if the prosecutor fail in proving the circumstances in which the aggravation consists, the defendant may still be convicted of the inferior and more simple offence (t).

(o) *Roberts & Ux. v. Herbert*, 1 Sid. 5; B. N. P. 299.

(p) *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(q) 1 Saund. 286; Hob. 153; B. N. P. 56.

(r) *Rivers v. Griffiths*, 5 B. & A. 630, and see *Spybey v. Hide*, 1 Camp. 181.

(s) *Pallas v. Rolle*, Bl. 900.

(t) Crim. Plead. 323, 2d edit. *Macally's case*, 9 Co. 676; Co. Litt. 282, a. For other illustrations see the different titles, FALSE STATEMENTS, LIBEL, &c. HOMICIDE, ACCESSARY, &c. But upon issue taken whether *A.* and *B.* were churchwardens, proof that one was and the other was not, was held to be insufficient, B. N. P. 299.

And where it was alleged that the plaintiff, constable of parish *A.*, was assaulted in the execution of his duty, it was held to be insufficient to prove him to be constable of a liberty of which *A.* was part. *Goodes v. Wheatley*, 1 Camp. 231. Where an indictment alleged that the defendant rescued goods which had been seized by the prosecutors, who were bailiffs, under a writ of *feri facias* and warrant, and upon motion in arrest of judgment the indictment was held to be bad for not setting out the writ, the judgment was arrested, although the Court held that an indictment would have lain for the single battery. *R. v. Westbury*, 8 Mod. 357.

Under a count against a sheriff for a voluntary escape, the plaintiff is entitled to recover if he prove a negligent escape (*u*).

Omission to
prove the
whole da-
mage.

In the case of *Coombe v. Pitt* (*x*), Lord Mansfield said, "In penal actions, the material fact must be charged, and a fact must be proved in such a manner that all those consequences will follow the verdict which ought to attend it. But aggravations, and all circumstances that do not *vary* the offence, are out of the case as to the necessity of proving them."

So in general a variance as to the *extent* of the damages alleged is immaterial.

If a plaintiff declare on a policy for a total loss, he may recover for a partial loss (*y*).

So if a plaintiff prove part of his breach of covenant (*z*) or promise (*a*).

But here, as in all other cases, although the omission to prove that which operates merely by way of aggravation will not be fatal, yet *part* of that which is alleged, and which is sufficient to support the charge or claim, must be proved.

The plaintiff, in an action of covenant, alleged that the defendant had not treated the farm in a husbandlike manner, but on the contrary thereof *had committed waste*. The defendant pleaded that he had not committed waste, &c., and issue being taken on this plea, it was held that the plaintiff could not go into evidence to show improper treatment of the farm, short of the commission of waste (*b*).

Here it is to be observed, that as the only breach in issue was the commission of actual *waste*, a term of known legal import, acts of bad husbandry not amounting to acts of waste could not constitute *any part* of the breach in issue.

Number,
magnitude,
extent.

Again, a mere variance as to number, magnitude, or extent, is not material, unless the *quantum* be descriptive of the nature of the claim or charge.

If a defendant be charged with engrossing 1,000 quarters, he may be convicted on proof of having engrossed 700 quarters (*c*).

If a plaintiff declare in ejectment for a fourth part of an estate, he may recover a third of one-fourth part (*d*).

(*u*) *Bonafous v. Walker*, 2 T. R. 126.
And see *Roberts & Ux. v. Herbert*, 1 Sid. 5.

(*x*) 3 Burr. 1586.

(*y*) *Gardner v. Croasdale*, Burr. 904.
Nicholson v. Croft, Burr. 1188; Bl. 198.
And see *Goram v. Sweeting*, 2 Saund. 205.
See also *Stevens v. Whistler*, 11 East, 51.
Tapley v. Wainwright, 5 B. & A. 399.

Russell v. Mitchell, 2 B. & Ad. 399. Vol. II. tit. TRESPASS.

(*z*) Burr. 1907; Bl. 200.

(*a*) Burr. 914.

(*b*) *Harris v. Mantle*, 3 T. R. 307.

(*c*) *Vare v. Austen*, Lane, 59.

(*d*) 1 Sid. 239; 1 Burr. 330.

In an action of waste for cutting down trees, it is sufficient to prove that the defendant cut down part of the number alleged (e).

So in an action to recover double the value of goods fraudulently removed to avoid a distress for rent, the *quantum* of rent alleged to be due is immaterial (f). Sums, &c.

If a defendant avow for half a year's rent in arrear, he will be entitled to a verdict, though he prove but a quarter's rent in arrear (g).

Proof of the tender of a larger sum will support an allegation of the tender of a smaller sum (h).

On an indictment for taking illegal brokerage, *i. e.* more than 10 s. in the pound, it is sufficient to prove that the defendant did in fact take more, without proving the precise excess as alleged, although it be alleged without a *videlicet* (i).

So on an indictment for extortion, alleging that the defendant extorted 20 s., it is sufficient to prove that he extorted 1 s. (h).

In debt for using a trade without having served an apprenticeship, it was held that the whole time laid in the declaration need not be proved; it being alleged that the defendant forfeited 40 s. for every month (l).

In an action of debt under the stat. 4 Geo. 2, c. 28, for double the yearly value of land held over (m), or for treble value for not setting out tithes, under the stat. of Ed. 6 (n), a variance in the value is immaterial, the action not being for a precise sum, but for a sum in proportion to the value or damage found by the jury.

In actions of trespass and replevin, if the defendant succeed in establishing his justification to the smallest extent in point of number or quantity, he will be entitled to a verdict, although a trespass be shown to a much greater extent (o).

(e) 2 Roll. Ab. 706; Co. Litt. 282, a.; Hob. 53.

(f) *Gwinnett v. Phillips & others*, 3 T. R. 643.

(g) *Harrison v. Barnby*, 5 T. R. 248. *Forty v. Imber*, 6 East, 434; 1 Saund. 285; Moor, 281; Salk. 580; B. N. P. 56. *Secus*, if he has title to two undivided parts of the rent only. Ibid. *Supra*, 1296. But in stating a demise, he cannot narrow the rent. Where the plaintiff declared in debt for rent, stating a lease rendering 15 l. per annum, and proved a lease rendering 15 l. and three fowls, the variance was held to be fatal. *Sands v. Ledger*, Lord Raym. 792.

(h) Vol. II. tit. TENDER.

(i) *R. v. Gilham*, 6 T. R. 265.

(k) Per Holt, C. J. *R. v. Burdett*, Lord Raym. 149.

(l) *Powell*, q. t., v. *Farmer*, Peake's C. 57.

(m) *Doe v. Jackson*, Dougl. 167, 704.

(n) Dougl. 704.

(o) Vol. II. tit. TRESPASS. LIBERUM TENEMENTUM. And see *Sloper v. Allen*, 2 Roll. Ab. 706; B. N. P. 299. *Down's case*, 4 Rep. 29, b. *Gray's case*, 5 Rep. 79. *Brook v. Willett*, 2 H. B. 224. *Rogers v. Allen*, 1 Camp. 313.

Divisibility
of aver-
ments.

The position, that a mere variance in point of extent or magnitude is not material, assumes the *divisibility* of the subject-matter, and does not apply in any case where the precise sum, quantity or magnitude alleged, is put in issue by the nature of the claim or charge (*p*).

It is an universal rule, that whatever is wholly surplusage, and might have been struck out on motion, need not be proved (*q*). And it seems to be clear in principle, that upon the question, whether a particular averment can be rejected, regard is rather to be had to the nature of the averment itself, and its connexion with the substance of the charge or claim, than to the mere formal manner in which it is averred.

And it seems to follow, that if averments be in their own nature divisible, supposing them to have been separately averred, they ought still to be so considered, although they be inseparable as far as the mere language of averment is considered, being connected together in one entire phrase or sentence.

The operation of this principle is in effect admitted and established in the most simple instances. If a man be charged with stealing twenty sovereigns, he may be convicted of stealing ten; the allegation is therefore considered to be divisible, although no part of the sentence can be omitted without destroying the whole, and although the ten sovereigns proved to have been stolen are inseparably connected, as far as language is concerned, with the remaining ten.

So, in numerous instances, allegations combined in the same sentence have been considered to be divisible and separable, when they are so with reference to the legal essence of a particular charge. Thus a prisoner charged with *burglariously* and feloniously stealing, may be convicted of feloniously stealing, should the evidence fail as to the burglary.

A defendant charged with composing and publishing a libel may be found guilty of publishing only.

So a general averment, including several particulars, may be construed *reddendo singula singulis*.

An averment that particular lands are in the occupation of A., B. and C., is proved by evidence that the lands are in their several occupations (*r*). And an allegation that lands are situated in the

(*p*) *Grant v. Astle*, Doug. 708, in note.
In re Gilbert v. Stanislaus, 3 Price, 54.
And see the cases cited in the following notes.

(*q*) See Lord Mansfield's observations,

in *Bristow v. Wright*, Doug. 642; and of the Judges, in *Hour v. Mills*, 4 M. & S. 470.

(*r*) *Pool v. Court*, 4 Taunt. 700.

parishes *A.* and *B.* is satisfied by evidence that part is situate in the parish *A.* and part in the parish *B.* (*s.*)

Divisibility
of aver-
ments.

Where a declaration for a false return to a *feri facias* against the goods of *A.* and *B.* alleged that *A.* and *B.* had goods within the bailiwick, it was held to be sufficient to prove that either of them had, the averment being severable (*t.*)

The plaintiff declared for a disturbance of his right of common, alleging that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture; and it was held that the averment was divisible; and that proof that the plaintiff was possessed of land only, and entitled to right of common in respect of that land, was sufficient to entitle him to damages *pro tanto* (*u.*)

The distinction is now established between matter of substance and matter of description; the former requires to be substantially proved, the latter to be literally proved (*x.*) And therefore, where the declaration against a sheriff for a false return, stated that the plaintiff, in Trinity term, in the second year of the reign of king George the 4th, recovered by the judgment of the Court, as appears by the record, and the proof was of a judgment in Easter term, in the third of George the 4th, it was held that the variance was not material (*y.*)

Distinction
between
matters of
substance
and of de-
scription.

In the next place, it is clear that no averment of any matter essential to the claim or charge can ever be rejected (*z.*) And this position extends to all allegations which operate by way of *description* or *limitation* of that which is material. Let an averment of this kind be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the *identity* of that which is material (*a.*)

Descriptive
allegations
cannot be
rejected.

(*s.*) *Goodtitle d. Bremridge v. Walter*, 4 Taunt. 671.

(*t.*) *Jones v. Clayton*, 4 M. & S. 349.

(*u.*) *Ricketts v. Salwoy*, 2 B. & A. 360; *Manifold v. Pennington*, 4 B. & C. 161. Vide *infra*, 448, note (*x.*)

(*x.*) *P. C. Stoddart v. Palmer*, 3 B. & C. 2.

(*y.*) Ib. "There are two kinds of allegations: one of matter of substance, which must be substantially proved; another, a matter of description, which must be literally proved." Per Lord Ellenborough, J. in *Purcell v. Macnamara*, 9 East, 160.

(*z.*) A declaration in debt for rent on a lease for years, payable at four terms, viz. the Annunciation, Midsummer, Michael-

mas, and the Nativity, showed that the rent was in arrear for one whole year, *scilicet*, à festo Annunciationis, 40, usque ad festum Annunciationis, 41, a retro fuit. After verdict for the plaintiff, on *non debet* pleaded, the Court held that the declaration was ill; for *a.* excludes the first feast of Annunciation, and *usque* excludes the last, and if the *viz.* should be void, there is no allegation when the year began. *Umble v. Fisher*, Cro. Eliz. 702.

(*a.*) Vide *supra*, 433. An indictment for stealing a note alleges that it was signed by *A. B.*, proof is material, *R. v. Cromer*, Russ. & Ry. C. C. L. 14. But it seems that whenever a sufficient description has once been given, a mere further useless and

Descriptive
allegations
cannot be
rejected.

Thus where the plaintiff, in an action against the sheriff for taking his lessee's goods in execution without leaving a year's rent, alleged that the rent was payable by four quarterly payments, it was held that this allegation, although unnecessary, must be proved (*a*). Here the necessary averment that rent was due was limited by the allegation to rent payable quarterly.

The plaintiff, in an action against his lessee for negligently keeping his fire, *per quod* the premises were burnt, alleged that he was tenant under a demise for seven years, whereas he was but tenant at will (*b*), and the variance was held to be fatal. Here the injury was to the plaintiff's reversionary interest: the fact of tenancy was essential; and the averment that it was a tenancy under a demise for seven years operated as a limitation and description of that which was material.

Where a common informer, in an action of debt against a sheriff's officer, in his declaration alleged a judgment, and a *feri facias* upon that judgment, it was held that he was bound to prove the judgment as well as the writ, although it was unnecessary for the plaintiff to have alleged the judgment at all (*c*).

Here again the allegation of the judgment, which was immaterial, operated by way of description and limitation of the writ, which was material.

So in an action for double rent on the statute (*d*), where the declaration alleged a lease for three years, and it appeared in evidence that the lease being by parol was void, and that the defendant was but tenant from year to year (*e*).

In trespass every part of the description of the place is material (*f*).

All these cases, some of which appear to have been carried to an extent scarcely warranted by general principles, were decided on the ground, that as the superfluous and unnecessary matter

unnecessary allegation need not be proved. *Draper v. Garratt*, 2 B. & C. 2. *Stoddart v. Palmer*, 3 B. & C. 2.

(*a*) *Bristow v. Wright*, Dougl. 640. Note, that this was a variance in the statement of a contract unnecessarily alleged. See Lord Kenyon's observations in *Gwinnett v. Phillips*, 3 T. R. 645. He there says, "I have heard both in and out of court, that the doctrine in *Bristow v. Wright* must be confined to contracts." So where a declaration for illegally insuring a lottery-ticket falsely alleged the consideration to be 43*l.* 2*s.*, although no alle-

gation of consideration is necessary. *Phillips v. Mendez da Costa*, 1 Esp. C. 59. But see the *Earl of Northumberland's case*, B. N. P. 55; Yelv. 148.

(*b*) *Cudlipp v. Rundle*, Carth. 202; Dougl. 643.

(*c*) *Savage*, q. t., v. *Smith*, 2 Bl. 1101, cited by Lord Mansfield, in *Bristow v. Wright*, Dougl. 643.

(*d*) 11 G. 2, c. 19, s. 18.

(*e*) *Shute v. Horsey*, K. B. East. 10 G. 3, cited by Lord Mansfield, Dougl. 643.

(*f*) Per Lawrence, J., 3 Taunt. 130. See Vol. II. tit. TRESPASS.

limited and described that which was *material*, it thereby became part of that which was material, and could not be rejected.

Descriptive allegations cannot be rejected.

Lord Mansfield, in the case of *Bristow v. Wright* (g), in citing the three last cases, observed that they were strong ones, but that they were authorities for the doctrine there laid down, as to the distinction between material and impertinent averments. He added, that he believed that the doctrine stood right, and upon the best footing, as it might prevent the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof, and might lead pleaders to confine themselves to state the legal effect (h).

Wherever precise sums, quantities or magnitudes, are essential to the nature of the charge or claim, a variance will be fatal; as where they are descriptive of a contract, prescription, or written instrument.

Sums, magnitudes, &c.

In the case of *Grant v. Astle* (i) the declaration alleged a custom for every customary tenant to pay a reasonable fine on his admission, to be assessed by the lord; that a certain tenement was of large annual value, viz. of the annual value of 23*l.* 8*s.* 9*d.*; that the lord had assessed 46*l.* 17*s.* 6*d.* as a fine for the defendant's admission to the tenement, and that this sum was reasonable. It appeared on the evidence that the fine should have been only 46*l.* 4*s.* 3*d.*, that sum being two years annual value; and it was held that the evidence did not support the declaration, for the plaintiff had no right to recover anything but the sum assessed, for the duty arose upon the assessment, and that by the evidence appeared to be illegal (k).

In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, it was held that an averment that the returns amounted to a particular sum was material, and must be proved, although the sum be alleged under a *videlicet* (l).

Where the lessor of an estate to *A. B.* declared in covenant against the defendant as the assignee of *all* the demised estate,

(g) Dougl. 643.

(h) See also *The Dean and Chapter of Rochester v. Pearse*, 1 Camp. 460. *A. B.*, Dean of Rochester, and the Chapter, declared for the use and occupation of premises held by the defendant, by the permission of the said dean and chapter; it appeared that the premises were occupied before *A. B.* was dean. Lord Ellenborough nonsuited the plaintiff; and the Court of

K. B. were afterwards divided upon the question, whether the variance was fatal.

(i) Dougl. 703, in n.

(k) Note, that the vice in this case was in the assessment itself, and could not have been aided by the mode of pleading. And see *Titus v. Perkins*, Skinn. 247; Carth. 13; 3 Lev. 249. 255; 3 Mod. 132.

(l) *Gilbert v. Stanislaus*, 3 Price, 54.

Descriptive
allegations
cannot be
rejected.

Allegations
when de-
scriptive.

and on a traverse of the assignment, as in the said declaration mentioned, it appeared in evidence that the defendant was assignee of part only of the demised estate, the variance was held to be fatal (*m*).

The question, whether an averment is to be considered as descriptive, and therefore material, depends principally upon the *nature of the averment itself*, and the subject-matter to which it is applied. But, 2dly, in many instances *the law* pronounces averments to be merely *formal*, which would otherwise, according to the ordinary rule, be deemed to be descriptive. 3dly. In other instances, again, the question depends upon the *particular and technical mode* in which the averment is framed.

In the first place, whenever an allegation *limits and narrows* that which is essential, it is necessarily descriptive.

Instances of this nature most usually occur in the description of written instruments and matters of contract and prescription.

In the description of libels or other written instruments (*n*), which are set out according to their tenor, every part necessarily operates by way of description of the whole ; for the libel alleged cannot be the same with that proved, when they vary as to any part, however unimportant (*o*).

Averments which apply a libel to a particular subject-matter, are in their nature descriptive of the legal injury ; for that depends upon the injurious nature of the meaning conveyed, which frequently arises wholly from the external facts to which the terms of the libel are made to apply by proper averments. The application, therefore, of the libel to those facts is descriptive not of the libel but of the injury (*p*) ; and consequently a failure in proving the

(*m*) *Hare v. Cator*, Cowp. 766.

(*n*) *Infra*, 477.

(*o*) *Supra*, 433.

(*p*) Vol. II. tit. LIBEL ; and see *Teesdale v. Clement*, 2 Chitty's R. 603. So in an action for words spoken of an attorney with reference to a former cause, the proceedings in that cause must be proved. *Parry v. Collis*, 1 Esp. C. 390.

The question, whether partial proof of the matters connected with the libel by means of an averment, be sufficient, must, it seems, depend upon the nature and quality of the subject-matters so connected. If the allegations altogether form one entire subject-matter, a contract for instance, then no part can be rejected ; for the contract being essential to the parti-

cular injury, every part of it is essential and descriptive. On the other hand, where the subject-matters of and concerning which the libel is alleged to have been published are in their nature cumulative and divisible, it should seem, that in principle such allegations are divisible. If, for example, it were alleged, that before the publication, &c. *M. N.* had committed three several highway robberies, and that the defendant published of and concerning the plaintiff, and of and concerning those robberies, this libel : "*A. B.* was accessory to *M. N.*" *innuendo* in the commission of the said robberies, and on the trial it ~~were~~ proved that *M. N.* had committed two robberies only, the injury would, it seems, be proved *pro tanto* as alleged ; for as far as regarded the two robberies, it was truly

application to one of several facts previously stated, is not a variance from the alleged libel, but only an omission to prove part of the injury. Descriptive allegations cannot be rejected.

And where a written instrument is not described by its tenor, but merely according to its substance and effect, if more be alleged in substance and effect than the legal construction of the instrument warrants, the variance will be fatal, although the allegation on which the variance arises was impertinent (*q*).

In cases of contract, the allegations of sums, magnitude and duration, are usually, in their very nature, essential to the identity of the contract; they are therefore descriptive, and must in general be proved as laid (*r*), unless the mode of averment show Contract.

alleged that he published the libel of and concerning them, and with the intent alleged; and although it is also averred that the libel was published of and concerning a third robbery, as well as of and concerning the two, yet that allegation would seem to be rather cumulative than descriptive in its nature. The substance of the complaint is, that the defendant charged the plaintiff with being accessory to three robberies, and the proof is that he charged him as being accessory to two of them. If, indeed, the allegation had been, that by the terms of the libel itself the defendant charged the plaintiff as accessory to the three, the variance would have been fatal, for this would have been to misdescribe a written instrument. No question, however, of this nature arises: the declaration truly states the instrument itself; the variance is merely as to the extent of its application and injurious effect, and these are divisible in their nature. If in such a case, previous to the statute enabling the defendant to plead several matters, three robberies had been in fact committed, and the defendant could have proved that the plaintiff was accessory to one, he must have pleaded his justification to that extent specially, and pleaded not guilty to the residue; and the facts alleged in the declaration being proved on the one hand, and the justification on the other, the plaintiff would, it seems, have been entitled to a verdict, having truly declared that the libel was published of and concerning the three felonies, and the justification extending to one only. In the case of *Lord Churchill v. Hunt*, 2 B. & A. 685, *supra*,

438; and *R. v. Sutton*, 4 M. & S. 532, the prefatory allegation seems to have been considered to be divisible.—The ordinary allegation in a declaration for a libel, that the defendant published it of and concerning the matter aforesaid, is not descriptive of the libel, and does not render proof necessary that it was concerning all the matters previously alleged; and therefore, where it was alleged that money had been applied in furtherance of a prosecution against *M.*, and that the defendant published the libel of and concerning the matters aforesaid, with intent to charge the plaintiff with a fraudulent application of certain money, and it appeared on reading the alleged libel that the charge was, that the plaintiff had after the termination of the prosecution misapplied the money, it was held that the variance was not material. *May v. Brown*, 3 B. & C. 113. And see *R. v. Horne*, Cowp. 72.

In the case of *Lewis v. Walter*, 3 B. & C. 138, where the declaration alleged that the defendant published a libel of and concerning the plaintiff, and of and concerning him in his profession of an attorney, and the plaintiff on the trial failed to prove that the libel was published of him as an attorney, it was held that this was sufficient, the publication being actionable without reference to professional character.

(*q*) Vide *infra*, VARIANCE, *Written Instrument*.

(*r*) *Supra*, 445; Vol. II. tit. ASSUMPSIT.—VARIANCE. *Gwinnett v. Phillips*, 3 T. R. 646. *King v. Pippett*, 1 T. R. 240. A special count in *assumpsit* for not paying a deposit on the purchase of

Contract. that the party did not profess to state the sum, magnitude, number, &c. precisely.

Where an action of tort is founded on a contract, a variance from the contract alleged will be as fatal as in an action on the contract itself (*s*); for the tort founded on the contract cannot be the same unless the contract be the same.

As a contract is in its nature entire, not only will a variance in omitting to prove the whole *consideration* as alleged, be fatal, but so also will an omission to prove the whole of the *promises* alleged to be founded upon that consideration, although the plaintiff prove the promise, and the breach of it, for which damages are sought to be recovered, and although it was unnecessary to state any other promise than that alleged to be broken (*t*).

Prescription.

As a prescription is founded on a supposed grant, and is therefore entire, for the subject-matter granted must necessarily be descriptive of the grant itself, it follows that partial proof of that which is claimed by the prescription is insufficient, although the proof fail only as to part which is not material on the trial. Thus where the defendant in an action of trespass prescribed for a right of fishery in four specified places, but proved the right to exist in three of them only, the variance was held to be fatal, although no trespass was proved in the excepted part (*u*).

So a prescription for a right of common, as appurtenant to a messuage and land, with the appurtenants, would not be supported by evidence of a prescriptive right appurtenant to the land only (*x*).

lands, averring that the defendant became the purchaser of divers (to wit, two lots), for divers sums of money, amounting in the whole to a large sum of money (to wit, &c.), is not proved by evidence of the purchasing of two different lots, though upon the same terms; for the agreements are separate in law and fact. *James v. Shore*, 1 Starkie's C. 426; Vol. II. tit. VENDOR & VENDEE.

(*s*) *Weall v. King*, 12 East, 452; *Green v. Greenbank*, 2 Marsh, 485. *Lopez v. De Tastet*, 1 B. & B. 538.

(*t*) Vol. II. tit. ASSUMPSIT.—VARIANCE.—It is otherwise where the law implies a promise, as in the case of *indebitatus assumpsit*. *Webber v. Tivill*, 2 Saund. 121; Vol. II.

(*u*) *Rogers and others v. Allen*, 1 Camp. 309. Heath, J. overruled the objection; but the Court of King's Bench afterwards granted a new trial. See also *Rotheram*

v. Green, Noy, 67; *Conyers v. Jackson*, Clay. 19. *Sloper v. Allen*, 2 Roll. Ab. 706. *Gray's case*, 5 Rep. 79. *Brooke v. Willett*, 2 H. B. 224.

(*x*) See *Ricketts v. Salwey*, 2 B. & A. 360; *supra*, 443. And see *Yarly v. Turnock*, Palmer, 260. *Sir Miles Corbet's case*, 7 Co. 5. *Hickman v. Thorne*, Freem. 211. *Pring v. Henley*, B. N. P. 50. *Kingsmill v. Bull*, 9 East, 185. It was there alleged as a custom in a manor, that the lord immemorially, until the division of a certain tenement into moieties, had a heriot, and that after the division he had a heriot for each moiety; and it was held, that the whole being one custom, was disproved by evidence of a division within the time of memory. Where it was alleged that a vestry had immemorially consisted of a certain number of select persons, it was held to be necessary to

An allegation of an absolute prescription or custom is not proved by evidence of a conditional or limited one (*y*). Prescription.

A prescription to have pot-water out of a river is not proved by evidence that he ought to have it, paying 6*d.* yearly (*z*).

So a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, is not proved by evidence that he ought to have the best beast or good (*a*).

But the proof of a more ample right than is alleged will not destroy the identity of a prescription, any more than it would the identity of a grant, for the fact that more was granted than is alleged does not disprove the allegation that so much was granted (*b*). Descriptive averments.

In actions also of tort, not founded on any contract or prescription, the question, whether an allegation be or be not descriptive, is one for the discretion of the Court, exercised upon the nature and circumstances of the particular case. Actions of tort.

If the allegation limit and confine that which is material, the latter can never be available to any greater extent, for an averment which limits and restrains in point of magnitude or extent is always so far descriptive. So it is if the allegation limit the quality of that which is material.

In cases of tort, it is sufficient to prove part of that which is alleged, and the only question is, whether the allegation be divisible, and capable of partial proof (*c*), or be of so entire a nature that it cannot be separated into parts (*d*).

prove that it had consisted of a definite number. *Berry v. Banner*, Peake's C. 156.

(*y*) *Gray's case*, 5 Co. 78 b. A privilege claimed for fastening ropes across a close in order to hang linen, and of hanging linen thereon to dry, is not proved by evidence of a privilege for tenants to hang lines across a yard for the purpose of drying linen of their own families only. *Drewell v. Towler*, 3 B. & Ad. 735.

(*z*) In a Devonshire case, cited by Popham, C. J. in *Gray's case*, 5 Co. 786.

(*a*) *Adderly v. Hart*, Trin. 4 Geo. 1. An avowry for a heriot in kind is not supported by evidence of a right to a sum assessed in lieu of a heriot in kind. *Parkin v. Radcliffe*, 1 B. & P. 393.

(*b*) *Johnson v. Thoroughgood*, Hob. 64. *Bushwood v. Bond*, Cro. Eliz. 722; B. N. P. 29. *Bailiff, &c. of Tewkesbury v.*

Bricknell, 1 Taunt. 142. *West v. Andrews*, 6 B. & Ald. 77.

(*c*) See *Eardly v. Turnock*, Palm. 269, Cro. J., 629. *Ricketts v. Salwey*, 2 B. & A. 360. *Manifold v. Pennington*, 4 B. & C. 161.

(*d*) See *Ricketts v. Salwey*, 2 B. & A. 360; *supra*. But note, that Abbott, C. J., said, that if there had been words of connexion, such as, "thereunto belonging," or other words of like import, to connect the messuage and land together as one entire tenement, he should have thought that the plaintiff was not entitled to recover. And see *Brown v. Hill*, 2 Scott, 535. A way was claimed by reason of the plaintiff's possession of a close. The evidence was of a way used to bring goods to an inn and yard; and that the plaintiff was the occupier of a close recently cut off from the yard; and this was held to be

Actions of
tort.

Several of the decisions on this head have already been referred to (e).

Character.

An allegation as to the character in which the plaintiff sues, or his title to damages, is usually in its nature descriptive, and requires proof, although it was superfluous. As where in an action for slandering a man in his profession or office, his appointment is unnecessarily alleged (f).

Where the plaintiff stated that he was proprietor *and editor* of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was proprietor (g).

Where the issue was, whether *J. S.* devised to *J. N.* and his heirs, or not, and the jury found that *J. S.* devised to *J. A.* for years, remainder to *J. N.* in fee, the Court adjudged *quod non devisavit modo et formâ* (h).

Where the declaration against the maker of a promissory note, payable to the bearer, unnecessarily alleged an indorsement by the payee, it was held that the plaintiff was bound to prove it (i).

If a party unnecessarily allege a specific title, he is bound to prove it, on a traverse taken (k).

Inducement.

Matter of inducement, it is said, need not be precisely proved (l).

insufficient, for the inn and yard were one entire subject matter to which the right belonged, and not merely to the frontage claimed by the plaintiff.

(e) *Supra*, 438; and see Vol. II. tit. CASE—ACTION ON. Where the declaration alleged that the plaintiff was possessed of a messuage, belonging to and supporting which were certain foundations, which the plaintiff had enjoyed or ought to enjoy; on the evidence it appeared that the plaintiff was entitled only to an easement in the foundations, which belonged to the defendant: it was held to be no variance; for the declaration does not allege any property in the foundation, but only an easement. *Brown v. Windsor*, 1 C. & J. 20.

(f) See Vol. II. tit. LIBEL.

(g) *Heriot v. Stuart*, 4 Esp. C. 437, cor. Kenyon, C. J. But note, that on a motion for a new trial, Lawrence, J. doubted; a rule *nisi* was granted, and afterwards a *stet processus* was entered by consent. See also *Stevens v. Aldridge*, 5 Price, 234. An indictment under the stat. 7 Geo. 3, c. 50, s. 1, states the pri-

soner to have been employed as a sorter and charger of letters; it was held that it was not sufficient to know that he was a sorter only. *R. v. Shaw*, 1 Leach's C. C. L. 79; East's P. C. 580.

(h) *R. v. Newdigate*, Sir W. Jones, 224, cited Dougl. 641.

(i) *Wayman v. Bend*, 1 Camp. 175.

(k) *Sir F. Leake's case*, Dyer, 365; 2 Will. Saund. 206, note (22,) *Goram v. Sweeting*.

(l) Per Buller, J. in *Gwinnett v. Phillips*, 3 T. R. 643. Per Chambre, J., in *Smith v. Taylor*, 2 N. R. 210. The distinction between the gist of the action, and that which is inducement,* is not always clear in principle. In *Smith v. Taylor*, which was an action for slandering a physician in his professional character, Chambre, J., considered that his being a physician was the very gist of the action, and therefore required strict proof. In *Gwinnett v. Phillips*, which was an action for fraudulently removing goods to prevent a distress for rent in arrear, Buller, J., said that the averment that rent was due was matter of inducement,

There seems, however, to be little difference in principle between such averments and any other; for if they are essential, they must be proved; and if they be alleged with descriptive circumstances, such description is material. Thus, if the terms of a contract be stated, though unnecessarily, by way of inducement, they must be proved (*m*).

Matter of inducement.

2dly. It is next to be observed, that in many instances circumstantial allegations are noticed by the *law* itself as merely *formal*, and as requiring no proof.

Formal by law.

These are to be regarded as exceptions made by the law, for convenience sake. Thus, it is laid down as a general rule in the *Trials per Pais* (*n*), that "where the issue taken goeth to the point of the writ or action, there *modo et formá* are but words of form."

The ground of which seems to be this, that where certain specific facts or actual results alone are essential to support the charge or claim, and the means, manner, and circumstances, occasioning or accompanying such facts or results, are purely immaterial, the latter may, without inconvenience, be regarded as merely formal, although perhaps originally such allegations, as well as those of time and place, might require strict proof.

In trover, for instance, the alleging the mode by which the defendant became possessed of the goods, whether by finding or

and therefore did not require strict proof; yet the fact that rent was due in the latter case was just as essential to the claim for damages, as the fact that the plaintiff was a physician was in the first case. If by *inducement* such averments only be meant as are not material, but which, if struck out would leave a valid charge or claim behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connexion in point of time, or otherwise, with other material averments.

Although Mr. J. Buller, in *Gwinnett v. Phillips*, intimates that proof of the precise sum of 57 *l.* alleged to be in arrear, was not necessary, *because it was mere inducement*, yet it is clear, that if the very same allegation had been made in an action to recover the very sum itself from the

tenant as rent in arrear, the precise proof would have been unnecessary; nor is it necessary in any case, unless from the very nature of the claim or charge the precise sum be material. *Supra*, and *R. v. Gilham*, 6 T. R. 265.

On the other hand, it is certain, that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement*, or not, or whatever its connexion may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. *Vide supra*, 443.

(*m*) *Bristol v. Wright*, Doug. 640. And so in all cases of tort where matter of contract is alleged, though but by way of inducement. *Lopez v. De Tastet*, 1 B. & B. 538. *Corney v. Mendez de Costa*, 1 Esp. C. 302. *Weall v. King*, 12 East, 452. (*n*) 389.

Formal by
law.

otherwise, is purely formal, and requires no proof, for the gist of the action is the conversion (*o*).

So upon indictments for homicide, the allegations of the kind of weapon or poison used to occasion the death need not be precisely proved (*p*); it is sufficient if the same kind of death be proved with that alleged.

Macalley's case (*q*) is a very strong instance to show the extent of this doctrine.

The indictment for the murder of *Fells* alleged that *P.* sheriff of London, upon a plaint entered, issued his precept to *Fells*, serjeant-at-mace, to arrest *Murray*; but on the evidence it appeared that there was in fact no precept, but that by the custom of London, after a plaint had been entered, any serjeant *ex officio* might arrest the defendant in the suit. But it was held by all the Judges that the variance was immaterial, for the warrant was but one circumstance, which was not necessary to be precisely pursued in evidence to be found by a jury; for the indictment alleged that the prisoner killed *Fells* of malice prepense; and although the evidence varied from the special matter, yet as it showed that the prisoner killed *Fells* of malice prepense it maintained the indictment.

Where the demandant, in a writ of entry on an alienation made by the tenant in dower to his disinherision, alleges an alienation in fee, and the tenant pleads that he did not aliene *modo et formâ* as the demandant has alleged, and it is found that the tenant aliened in tail or for life, yet the demandant is entitled to recover; for the real question is, whether the tenant did aliene (*r*).

*So if in assize of *darrein presentment*, the plaintiff alleged an avoidance by privation, and the jury found an avoidance by death; for the mere *result*, viz. the avoidance, is alone material; the manner of it is immaterial (*s*).

So again, if in an action against a wrong-doer for a disturbance of the plaintiff in his office, he mistake his title in the declaration, and the special verdict find a title for him different from that on which he has declared, yet judgment will be given for him not-

(*o*) See *TROVER*.

(*p*) See *Macalley's case*, 9 Co. 65.

(*q*) *Ibid*.

(*r*) Litt. sec. 483; Trials per Pais, 387.

(*s*) 1 Inst. 282; Trials per Pais, 385.
So if guardians of a hospital bring assize

against the Ordinary, and he pleadeth in his visitation he deprived him as Ordinary, whereupon issue is taken, and it is found he deprived him as patron, the Ordinary shall have judgment; for the deprivation is the substance of the matter.

withstanding the variance (*t*); for as the disturbance occasions the action, the finding the title is held to be purely superfluous. Formal by law.

In these and the like instances the variances are immaterial, not because such allegations are in their own nature merely formal, but because the law considers them to be so with reference to the matter directly in issue; the very same allegations, where the point arose *collaterally*, would be material. For it is also laid down as a rule, that "where a *collateral* point in pleading is traversed, there *modo et formâ* is of the substance of the plea (*u*).

And, therefore, if a feoffment by deed be pleaded, and the defendant traverses "*absque hoc quod feoffavit modo et formâ*," the jury cannot find a feoffment without a deed (*x*).

So if a feoffment by two be alleged, and it be found to be the feoffment of one only (*y*).

Another distinction is, that although the issue be upon a collateral point, yet, if by the finding of part of the issue it shall appear to the Court that no such action lieth, there *modo et formâ* are but words of form (*z*).

That is, partial and deficient proof may be sufficient in law to show that no action is maintainable, although by reason of the defect the proof be sufficient to support the affirmative of the issue, the proof of which lies on the defendant.

The lord distrains; the tenant brings trespass. The lord pleads that the tenant holds by fealty and rent, and prays judgment of the writ. The tenant replies that he does not hold *modo et formâ*.

(*t*) Cro. Eliz. 335. 419; Cro. J. 630; Com. Dig. Action on the Case for a disturbance, B. 1; B. N. P. 76; 1 Will. Saund. 346 (2). *Secus*, if the plaintiff set out an insufficient title. *Dorne v. Cashford*, 1 Salk. 363. *Crowther v. Oldfield*, 2 Ld. Raym. 1230; 1 Will. Saund. 346, a. note (2). But on issue joined on a plea of justification, under a right of common, to an action of trespass, or avowry damage-tenant, the title, by prescription or otherwise, must be proved as laid. *Supra*, 389. *Sir Francis Leake's case*, Dyer, 365; 1 Will. Saund. 346, n. (2). Even although it would have been sufficient for the defendant to have relied on his possession alone: as where the defendant justifies an escape of the cattle from a common to the close in which, &c., through defect of a fence which the plaintiff is bound to repair, or an escape from the defendant's own close (*Faldo v. Ridge*,

Yelv. 75); for although all that is necessary in such a case is to show that the cattle were not trespassers in the place from which they escaped, as if the defendant was tenant at will, or had a license to put the cattle there, yet if the defendant does not rely upon the averment of possession, but alleges a precise estate, the averment is traversable. *Sir Francis Leake's case*, Dyer, 365; 1 Will. Saund. 346 (2).

(*u*) Trials per Pais, 389; B. N. P. 301. See the preceding note.

(*x*) Co. Litt. 282; Trials per Pais, 389.

(*y*) *Ibid.* So if the issue be, whether *A.* and *B.* were churchwardens, proof that one was, but that the other was not, would not be sufficient. 2 Roll. 706; B. N. P. 299.

(*z*) Co. Litt. 282; Trials per Pais, 389; B. N. P. 301.

Formal by
law.

If the verdict find that the tenant holds by fealty only, yet the writ shall abate, although the tenant does not hold as the lord has alleged; for as the plaintiff was tenant he cannot maintain trespass against his lord, although he distrain for services which he ought not to have (*a*), for the only material question is, whether he holds of him, or not (*b*). But it would have been otherwise in replevin, for there the avowant must make out his title to have a return according to his allegations (*c*).

Probably in early times precise proof was required of the formal allegations, even of time and place; indeed, the statute of Gloucester, in the case of an appeal of murder, required the very hour to be stated; an idle and nugatory enactment, unless proof of the averment were requisite. The *place* was essential for the purpose of awarding the *venire*.

The inconvenience of requiring strict proof has, in these and many other instances, left the mere form and semblance of precision; and as the law pronounces such allegations to be purely formal, they deceive no one.

Mode of
allegation.

3dly. The question whether an averment is to be considered as descriptive, depends much on the mode of allegation. There are two kinds of allegations, one of which must be substantially proved; another a matter of description, which must be literally proved (*d*).

Debt, on a demise for years; plea, *nil habuit*, &c.; replication, that he had a sufficient estate to make the demise, *scilicet*, an estate in fee: it was held to be sufficient for the plaintiff to prove any estate which would enable him to make the demise (*e*).

Videlicet.

In many instances precise proof is rendered unnecessary by the form of allegation (*f*), which shows that the party did not mean to bind himself to precise proof; as where sums or magnitudes are averred under a *scilicet* or *videlicet* (*g*), the effect of which is to render precise proof unnecessary, in some instances, where it would otherwise have been essential (*h*); although it never renders precise proof unnecessary where from the nature of the case it is otherwise essential (*i*). Neither does the want of it ever render

(*a*) Co. Litt. 282; Trials per Pais, 387;
B. N. P. 301.

(*b*) By the stat. of Marl. c. 3.

(*c*) B. N. P. 302.

(*d*) Per Ld. Ellenborough, in *Purcell v. Macnamara*, 9 East, 157.

(*e*) *Wilson v. Field*, Skinn. 624.

(*f*) See the observations of Chambre, J.,
2 N. R. 210.

(*g*) The expression "divers, to wit,

50 years before the death," in a special verdict is too loose and indefinite. *Doe v. Earl of Jersey*, 3 B. & C. 370.

(*h*) See 2 Will. Saund. 201. *R. v. Aylett*, 1 T. R. 63; Crim. Plead. 252, 2d edit. *Symmons v. Knox*, 3 T. R. 65.

(*i*) 4 Taunt. 320; 1 T. R. 656. As in the case of a contract, where the consideration is material and traversable: *infra*, notes (*h*) and (*n*).

precise proof necessary, where from the nature of the case it is not essential. *Videlicet*.

Where the consideration was alleged to be the forbearance of 21 *l. 6s.* without a *videlicet*, and the proof was of a forbearance of 20 *l. 18s.*, the variance was held to be fatal (*k*).

But where the declaration alleged that *S. F.*, the father of the defendant, was indebted to the plaintiff in a certain sum, *to wit*, the sum of 26 *l. 13s. 6d.*, being the *unpaid balance* of a larger sum; and that, in consideration of the plaintiff's forbearance to sue for the recovery of the balance of 26 *l. 13s. 6d.*, the defendant undertook to accept a bill for the amount of the balance of 26 *l. 13s. 6d.*, and the balance really due was 26 *l.*, it was held to be no variance, the payment of the balance being the consideration for the promise, and the statement of a particular sum was unnecessary (*l*).

But it is a general rule that a *videlicet* will not protect, where precision is rendered essential by the nature of the case (*m*).

The defendant avowed that the plaintiff held certain lands of him, as his tenant, at a certain rent, *to wit*, at 110 *l.* rent, payable half yearly; upon *non tenet* pleaded, it appeared that the land had been let by a written contract of 15 *s.* per acre, and that

(*k*) *Arnfield v. Bate*, 3 M. & S. 173.

So where the consideration for the purchase of sheep was alleged to be 54 *l. 11s. 6d.*, and turned out to be 54 *l. 12s. 6d.* *Durston v. Tuthan*, cited in *Symmons v. Knox*, 3 T. R. 67; 2 Will. Saund. 291, c. Note, that in *Durston v. Tuthan*, the action was on a warranty, and it was unnecessary to aver the price. It seems that the rule is this, that where the declaration would have been good without laying any sum, there, although a sum be alleged, but under a *videlicet*, a variance would not be material.

In the case of *Laing v. Fidgeon* (6 Taunt. 108), it was held that an allegation of a contract to deliver saddles to the plaintiff at a reasonable price, was supported by proof of an agreement to deliver saddles at 24 *s.* and 26 *s.* And it seems that if the declaration state the consideration to be certain reasonable reward, proof that a specific sum was agreed on will not be material as to variance. *Bayley v. Trecher*, 2 N. R. 458.

(*l*) *Bray v. Freeman*, 2 Moore, 114.

(*m*) An allegation under a *videlicet*, that the Court was sitting on a day out of term, may be rejected as surplusage. *Lockett v. Plumber*, 2 B. & B. 659; and see *Draper v. Garratt*, 2 B. & C. 2. In *Preston v. Butcher*, 1 Starkie's C. 3, in assumpsit for not employing the plaintiff as a clerk, the amount of the salary, though laid under a *videlicet*, was held to be material. See also *Crispin v. Williamson*, note (*n*). *White v. Wilson*, *infra*, 459. *Gladstone v. Nevill*, 13 East, 409. Where the consideration for a promise is material and traversable, the stating it under a *videlicet* will not avoid a variance. 6 T. R. 462; 2 B. & P. 48; 2 Will. Saund. 207; 1 Str. 233; 5 T. R. 71; 4 T. R. 591; 2 T. R. 68. Under a declaration for maliciously charging the plaintiff with an offence punishable by law, *to wit*, felony, a charge of felony must be proved, for if the allegation under the *videlicet* were to be rejected there would be no charge at all. *Davis v. Noake*, 1 Starkie's C. 377.

Videlicet. the whole amounted to 111*l.* per annum; and the variance was held to be fatal (*n*).

Where the defendant pleads a set-off to a bond, the averment of the sum really due is material, and traversable, though laid under a *videlicet* (*o*).

But the want of a *videlicet* will, in many cases, be immaterial, where, from the nature of the case, the precise sum, date, place, magnitude or extent, is unnecessary, and the allegation is not descriptive of matter of contract (*p*).

Partial
proof in-
sufficient,
when.

It is scarcely necessary to remark that partial proof is in no case sufficient, unless the facts proved, if alleged alone, would have constituted a ground of action, or of criminal charge of the nature alleged.

Thus, although on a charge of murder the prisoner may be found guilty of manslaughter merely, yet upon a charge of felony he cannot be convicted of a misdemeanor, although the facts proved constitute a misdemeanor (*q*).

Excess of
proof.

In the next place, the proof of more facts, circumstances and particulars, than are alleged, will not be material, unless that which is so proved, but not alleged, be so inconsistent with some essential allegation as to disprove it altogether. Proofs in their very nature must ordinarily be particular, although the allegations be general, and therefore mere simple redundancy of proof is usually unimportant.

If a man be charged with stealing ten sovereigns, proof that he stole twenty is no variance as to the legal identity of the offence, for it is still true, as alleged, that he stole ten.

Proof that a party has a right for a stated time, proves also that he has the right on a particular day* included within that time (*r*).

*

(*n*) *Brown v. Sayce*, 4 Taunt. 320. Note, that Mansfield, C. J. said that the record would certainly be evidence as to the amount of the rent between the same parties in another action. So where the plaintiff alleged that he had agreed to sell, and the defendant to buy, certain goods and merchandises (to wit, 328 chests and 30 half-chests of oranges and lemons, (at and for a certain price (to wit, the price of 623*l.* 3*s.*), and the contract proved was for 300 chests and 30 half-chests of China oranges, and 20 chests of lemons, it was held to be a fatal variance. *Crispin v. Williamson*, 1 Moore, 547. See also *Green v. Rennett*, 1 T. R. 656. *White v.*

Wilson, 2 B. & P. 116; *infra*, 459. *Pope v. Foster*, 4 T. R. 590. *Grimwood v. Barritt*, 6 T. R. 460. *Johnson v. Prickett*, cited *ibid.* *Bristow v. Wright*, Dougl. 665. *R. v. Mayor of York*, 5 T. R. 71. *Gilbert v. Stanislaus*, 3 Price, 54; 386.

(*o*) *Grimwood v. Barritt*, 6 T. R. 460.

(*p*) *R. v. Gilham*, 6 T. R. 265; *supra*, 441. *Gwinnett v. Phillips*, 3 T. R. 643. *R. v. Burdett*, 1 Ld. Raym. 149; 2 Camp. 231.

(*q*) *R. v. Westber*, Str. 1133; *Crim. Pleadings*, 2d edit. 345, 6.

(*r*) *Brownl.* 178.

Proof of the tender of a larger sum supports an allegation of the tender of a smaller sum (*s*). Excess of proof.

Proof of a prescriptive right more ample than that which is alleged establishes that right as far as it is claimed (*t*).

Evidence that a modus exists in respect of several farms or closes proves an allegation that it exists with respect to one of them (*u*).

An allegation that a bill of exchange was drawn upon and accepted by *A. B.* and *C.* is proved by evidence of a bill drawn on and accepted by them jointly with a fourth (*x*).

So also an averment that money was received by *A.* is proved by evidence of a receipt by him jointly with a deceased partner (*y*).

An averment that *A.* was bound by a deed is proved by evidence that *A.* and *B.* bound themselves (*z*).

Proof that *A. B.* supplied the poor of *W.* and of other parishes with provisions, satisfies an allegation that he supplied the poor of *W.* (*a*).

So if upon a charge of libel, or of breach of covenant or promise, it appear in evidence that the defendant published a libel containing not only the matter charged, but containing also additional injurious matter; or that he further covenanted or undertook to do some other thing, the breach of which further covenant or promise is not complained of, the additional evidence would be immaterial, for the charge or claim would still remain fully established to the extent alleged (*b*).

But whenever that which is proved, in addition to that which is alleged, is descriptive of it, and affects its identity, the variance is fatal, for that which is essential to a correct description has been omitted. When material.

If it appear in evidence that part of a libel, covenant or promise, proved, but not alleged, qualifies or alters the sense of the libel, covenant or promise stated, the variance would be fatal, for the addition disproves the allegation.

Thus if the plaintiff declare on a covenant to repair at all times, and the covenant in fact contain the additional words "and at

(*s*) See Vol. II. tit. TENDER.

(*t*) *Supra*, 449. 1 Ford's MS. 404; 4 T. R. 160; 1 Skinn. 347. *Bruges v. Searle*, Carth. 219.

(*u*) *R. v. Walker*, Ford's MS. 404.

(*x*) *Mountstephen v. Brooke*, 1 B. & A. 224.

(*y*) *Richards v. Heather*, 1 B. & A. 20.

(*z*) Vol. II. tit. DEED. *South v. Tanner*, 2 Taunt. 204.

(*a*) *West v. Andrews*, 1 B. & C. 77.

(*b*) *Supra*, 375; Vol. II. tit. LIBEL. *Squier v. Hunt*, 3 Price, 68. *Miles v. Sheward*, 8 East, 7. *Handford v. Palmer*, 2 B. & B. 359.

Excess of
proof.

farthest within three months after notice," the variance is fatal (*c*).

So if the plaintiff declare on an absolute promise, and a conditional one be proved (*d*).

When ma-
terial.

So if it be alleged as an absolute covenant or promise, and an exception, qualification or limitation, be annexed to it (*e*); as, if a covenant be alleged to repair generally, and the covenant proved contain an exception of casualties by fire (*f*).

Debt for rent on an indenture; the omission of an exception, referring to a subsequent proviso for the reduction of the rent, is fatal, although the reduction is to be made on the happening of a certain event, which has not happened (*g*).

Where a declaration for assaulting a constable in the execution of his office, alleged that he was constable of a particular parish, and the proof was that he was sworn in for a liberty, of which the parish was part, the variance was held to be fatal (*h*).

So if part only of a person's name be averred (*i*).

Upon the same principle, a plea of tender of half a year's rent, simply, is not proved by evidence of the tender of half a year's rent,

(*c*) *Horsefall v. Testar*, 1 Moore, 87.

(*d*) See Vol. II. tit. ASSUMPSIT.—VARIANCE. *Tate v. Wellings*, 3 T. R. 531. *White v. Wilson*, 2 B. & P. 116. *Layton v. Pearce*, Dougl. 16. *Churchill v. Wilkins*, 1 T. R. 447. *Secus*, if the condition merely affect the quantum of damages on a breach of contract. *Clarke v. Gray*, 6 East, 564. *Parker v. Palmer*, 4 B. & A. 387. *Thornton v. Jones*, 2 Marsh. 287.

(*e*) See *Brown v. Knill*, 2 B. & B. 395. As, if the promise be alleged as an absolute promise, and the proof be of a promise in the alternative. *Perry v. Porter*, 2 East, 2. *Cook v. Manstone*, 1 N. R. 351. See also *Houell v. Richards*, 11 East, 633. *Tempany v. Bernard*, 4 Camp. 20.

Where the declaration in debt for rent alleged a demise for 15*l.* rent per annum, under a power to make leases for twenty-one years, and the evidence was of a demise for 15*l.* rent per annum, and three fowls, under a power to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not punishable of waste, the variance was held to be fatal, both in misdescribing the power as general when it was special, and in misdescribing the rent. *Sands v. Ledger*, Ld. Raym. 792; cited Dougl. 641. An alle-

gation of an undertaking to carry from *L.* to *D.*, and there to deliver, &c., is not satisfied by evidence of an undertaking to carry and deliver, &c., fire and robbery excepted. *Latham v. Rutley*, 2 B. & C. 20. An indictment under the 3 & 4 W. & M. c. 9, alleged the letting of a lodging-room by contract to James Bew; the Judges thought that this imported an exclusive letting to James Bew. *R. v. Bew*, Russ. & Ry. C. C. L. 480. A demise of three rooms at a certain rate varies from a demise of the three, and also a fourth at that rent. *Salmon v. Smith*, 1 Saund. 202. Yet it seems that a demise may be pleaded as parcel without averring the whole. As, if *A.* demise to *B.* two acres for a term, and *B.* be ejected of one by a stranger, he may allege a demise of the one. Per Saunders' arg. 1 Saund. 208. The distinction is, that in the former case the contract is described.

(*f*) 2 B. & B. 395.

(*g*) *Vavasour v. Ormerod*, 6 B. & C. 430. *Secus* had the exception been contained in a distinct clause; *ibid*.

(*h*) *Goodes v. Wheatley*, 1 Camp. C. 231.

(*i*) *Arbouin v. Willoughby*, 1 Marsh. 477.

requiring the lessor to give change and pay back the property tax (*h*). Excess of proof.

It has even been held, that where a statute, in describing the subject-matter of aggravated larceny, uses a general term and also a specific one, it is not sufficient to use the general for the specific description, where the latter is applicable (*l*).

In assumpsit the consideration is of so entire a nature, that not only must it be proved to the extent alleged, but an omission to allege any part is fatal; for if any part be omitted, then the basis of the promise is misdescribed; it is not true, as stated, that the defendant's promise was founded upon the consideration alleged, when it was in fact founded upon that and something else which is also essential to its support (*m*). Contract.

Where a sailor declared for wages, and the average price of a negro slave, due to him in consideration of service during a certain voyage, "to wit, a voyage from London to the coast of Africa, and from thence to the West Indies," and in the articles it was described as "a voyage from London to the coast of Africa, from thence to the West Indies or America, and afterwards to London in Great Britain, or to some delivering port in Europe," the variance was held to be fatal, notwithstanding the *scilicet* (*n*).

But if the additional matter proved does not alter the legal effect of that which is alleged, the variance will be immaterial. An averment, that in consideration that the defendants had become tenants to the plaintiff of certain premises, they undertook to keep the same in good and tenantable repair, is proved by an agreement containing a variety of provisions, and amongst others, that the defendants would make good all repairs within three months after notice by the plaintiff of the want of repairs; for the obligation to repair arises out of the tenancy, and the agreement was evidence to prove the promise as laid (*o*). An allegation

(*h*) *Robinson v. Cook*, 6 Taunt. 336.

(*l*) *R. v. Cook*, Leach's C. C. L. 123, 3d edit.

(*m*) *Swallow v. Beaumont*, 2 B. & A. 265. *Clarke v. Gray*, 6 East, 564. *Parker v. Palmer*, 4 B. & A. 387. *Thornton v. Jones*, 2 Marsh. 287. *Jones v. Cowley*, 4 B. & C. 445. Vol. II. tit. COVENANT—NON EST FACTUM—ASSUMPSIT—VARIANCE. Where the evidence applied only to the second count, in which the regulations of an association for mutual assurance indorsed on the policy were altogether

omitted, held that as they formed a material part of the contract, the plaintiff could not recover, and that as they also qualified the consideration stated in the instrument, and materially altered the situation of the parties in certain cases, it was a fatal variance in the statement of the contract. *Strong v. Rule*, 11 Moore, 86.

(*n*) *White v. Wilson*, 2 B. & P. 116.

(*o*) *Colley v. Stretton*, 2 B. & C. 273. It is in general sufficient to state the consideration, and the act to be done, the breach of which is complained of. See

Excess of
proof.
Contract.

of a contract for the delivery of gum Senegal, is supported by evidence of a contract for the delivery of *rough* gum Senegal, coupled with evidence that all gum Senegal on its arrival in this country is called rough (*p*).

So where the declaration alleged that the defendant had bought of the plaintiff a quantity of East India rice, according to the conditions of sale of the East India Company, at a specified price, to be put up at the next Company's sale, if required, and it appeared in evidence, that in addition to those conditions the rice was to be sold *per sample*, it was held that this was no variance, for it was not a description of the commodity, but a collateral engagement that it should be of a particular quality (*q*).

A variance, which would be fatal if it arose from superfluity of allegation, is frequently immaterial when it arises from mere redundancy of proof. For the superfluous particulars, wherever they are descriptive, must be proved as alleged, although they were unnecessary, and are consistent with the proof as far as it goes.

But redundancy of proof is immaterial unless the facts proved, but not alleged, are inconsistent with the allegations. Thus, if it be alleged, that in consideration of 100 *l.* A. promised to go to Rome, and also to deliver a horse to the plaintiff, and the plaintiff were to fail in proving the latter branch of the promise, the variance would be fatal, although he sought to recover in respect

note (*c*), and *Cotterill v. Cuff*, 4 Taunt. 285. *Handford v. Palmer*, 2 B. & B. 359. *Gladstone v. Neale*, 13 East, 410. *Crispin v. Williamson*, 8 Taunt. 107. *Mills v. Steward*, 8 East, 7.

(*p*) *Silver v. Heseltine*, 1 Chitty, 39. See also *Parker v. Palmer*, 4 B. & A. 387. So where the plaintiff declared that the defendant had agreed to buy of the plaintiff a large quantity of head-matter and sperm-oil in the possession of the plaintiff, and the contract proved was for the purchase of all the head-matter and sperm-oil per the Wildman, it was held that there was no variance; for the allegations were proved as far as they went, and the additional matter proved (that it was oil by the Wildman) was immaterial; it did not qualify or annex any condition to what was stated. *Wildman v. Glossop*, 1 B. & A. 9; vide *infra*, 402. But it seems, that if the declaration alleged an agreement for goods expected by particular

ships, a variance would be fatal; as, if the declaration allege an agreement to sell goods expected by the Fanny Almira, and the agreement proved is for the goods expected by the Fanny and Almira (*Boyd v. Siffkin*, 2 Camp. 326). So an agreement alleged to be for the delivery of all merchandisable skins, varies from the proof of a contract to deliver all merchandisable calf-skins. B. N. P. 145.

(*q*) *Parker v. Palmer*, 4 B. & A. 387. Note, that the goods did not correspond with the samples; but after seeing the samples the defendant had taken upon himself the disposition of the goods, and had put them up to sale at a limited price, and bought them in again; the Court held, that after this he could not repudiate the contract; and the jury found that he had not repudiated the contract within a reasonable time; therefore the sale was in effect complete.

of the breach of the former part of the promise only, and the statement of the latter part of it was unnecessary. But if he had alleged the former part of the promise only, proof that the defendant also promised to deliver the horse would be immaterial; for true it is, that for the consideration stated the defendant did promise to go to Rome, although in fact he also promised, in addition, to deliver the horse.

Excess of
proof.
Contract.

But where the subject-matter is entire, a variance in proof shows the allegation to be defective, and is therefore material.

Thus, if the allegation be that the defendant promised to pay 100*l.* in consideration of the plaintiff's going to Rome, and also delivering a horse to the defendant, a variance, either in omitting to prove the whole consideration, supposing the whole to be alleged, or in proving the whole, where part only was alleged, would be equally fatal; for in the latter case the proof would show that the consideration for the promise was defectively stated.

But although the proof of more than is alleged may not prejudice by way of variance, it seems to be an universal rule that a plaintiff or prosecutor can in no case, by any proof exceeding the quantity, magnitude, or extent alleged, entitle himself to a larger verdict than if the proof had not exceeded the description; for although the precise quantity, or extent, or magnitude, need not be proved as laid, yet they are so far descriptive that they operate as limits which the party himself has prescribed, and which he ought not to be permitted to exceed.

Excess of
proof not
available to
increase
the da-
mages.

Thus a plaintiff is always limited by the damages averred; he cannot prove more than one trespass on any one count beyond the temporal limit averred (*r*).

Upon indictments for larceny in a dwelling-house, the prosecutor is bound by the value assigned to each article.

It is an universal rule, that it is sufficient to prove an allegation according to its legal effect (*s*).

Legal
effect.

Thus a promise to pay may be supported by proof of a written instrument, whose tenor is, I promise *not* to pay, the word *not* having been fraudulently inserted (*t*).

Where a certain day is limited for the payment of an antecedent debt, an allegation of payment at a particular day is proved by

(*r*) Vol. II. tit. TRESPASS.

(*s*) See *Barbe v. Parker*, 1 H. B. 283; **infra*, 479. Where the allegation is made according to the fact, there is no ground for an objection, on the score of variance, that it is not stated according to the legal

effect. *R. v. Healey*, 1 R. & M. C. C. L. 1.

R. v. Hurrell, 1 R. & M. C. C. L. 296.

(*t*) 2 Atk. 32. See also *Arnold v. Revault*, 1 B. & B. 443; Vol. II. tit. BILL OF EXCHANGE.

Legal
effect.

evidence of payment before the day, for payment before is a payment at all times (*y*).

In civil cases, and upon indictments for treason and misdemeanors, the act of one is the act of all who procure the act to be done, although they be absent at the time of the act; and in the case of homicide, an allegation that *A.* struck the fatal blow, and that *B.* and *C.* were present, aiding and abetting, is satisfied by evidence that *B.* struck the blow, and that the others were present aiding and abetting; for in point of law the act of one is the act of all (*x*).

If the terms used in the allegation and proofs be convertible in fact, the variance will not be material.

In *assumpsit* on an agreement to take certain stock at a valuation, an allegation that a valuation made amounted to a specific sum, is satisfied by evidence of a valuation to that amount, setting forth the price of each article, with a condition that if any of the pans should prove to be broken the first time of using, an allowance should be made thereon, there being no evidence that any of the pans were broken at the time specified (*y*).

An allegation of a contract to deliver stock on the 27th of February, is satisfied by evidence of a contract to deliver on the settling day, coupled with proof that the 27th was fixed for and understood by the parties to mean the 27th (*z*).

The plaintiff declared on a contract for the purchase of a certain quantity, to wit, eight tons of goods; the proof was of a contract for the purchase of *about* eight tons; the precise quantity, which was not known at the time of the contract, having been ascertained to be eight tons; and it was held that the variance was not material (*a*).

(*u*) *Dyer*, 222; *Vin. Ab. Ev. T. b.* 111, 112. *Secus*, where the payment is made before the day when the debt becomes due by the condition of a bond. *Ibid.*

(*x*) *Fost. Disc.* 351; 9 *R.* 67; 1 *Plow.* 98; 1 *Salk.* 334.

(*y*) *Welsh v. Fisher*, 2 *Moor.* 378. In *Payne v. Hayes* (*Str.* 74; *B. N. P.* 145), where the contract declared on was to deliver stock on the 22d of August, and the evidence of the entry in the broker's book was a contract for the opening, the variance was held to be fatal, although it was proved to be notorious that the books were to open on the 22d, and the broker swore that he took the 22d and the open-

ing to be convertible terms. But this is to be considered rather as a mode for getting rid of a South-sea contract, than as a precedent. An allegation of an agreement to take a full cargo is not satisfied by proof of an agreement to take on board 500 quarters of wheat, although that quantity amounted to a full cargo. *Harrison v. Wilson*, 2 *Esp. C.* 108. *Vide supra*, 460, note (*p*).

(*z*) *Wickes v. Gordon*, 2 *B. & A.* 335. See the preceding note.

(*a*) *Gladstone v. Neale*, 13 *East*, 410. And see *Crispin v. Williamson*, 8 *Taunt.* 107. An allegation of a promise to remove goods within a reasonable time is

The allegation that *A.* uttered a counterfeit note under the false pretence that it was a genuine note, may be proved by the fact of uttering, though *A.* said nothing at the time (*b*). Legal effect.

An allegation that *A. B.* became bankrupt cannot be proved but by evidence of a commission (*c*). It is not sufficient to show that a commission might have been supported (*d*).

All averments in terms which have an authorized legal sense and meaning annexed to them must be understood in that sense, and are not satisfied by proof according to the popular and vulgar sense (*e*). Proof of tenor of Act.

Several of the decisions on the subject of variance are noticed in considering the evidence on the particular subjects with which they are connected. It may be proper, however, in this place, to refer to some of the most general applications of the foregoing principles, particularly with reference to allegations of time (*f*) and place (*g*)—parties, and their names (*h*)—their acts (*i*), and the consequences of such acts (*k*)—intentions (*l*)—written instruments (*m*), &c.

A variance from the formal allegation of the time of committing an act is not material, where it is proved to have been committed before the commencement of the suit (*n*), or the finding of the bill by the grand jury in criminal cases (*o*). Time.

And *autrefois acquit*, upon an indictment laying the offence on one day, may be pleaded to an indictment laying the offence to have been committed on a different day (*p*).

Although arson be alleged to have been committed in the night-time, the offence need not be proved to have been committed in the night-time (*q*).

But where in a declaration the injury is laid with a *continuando*, although the plaintiff may prove any number of acts within the time specified, yet if he go beyond that limit he is confined to a single act; for the allegation, as far as regards the continuation and number of injuries, is descriptive (*r*).

satisfied by evidence of a promise to remove them in a month. *Hore v. Milner*, Peake's C. 42 (*a*).

(*b*) *R. v. Freeth*, Russ. & Ry. C. C. L. 127.

(*c*) *Bulkeley v. Lord*, 2 Starkie's C. 406.

(*d*) *Ibid*.

(*e*) Vol. II. tit. PAROL EVIDENCE.

Doe v. Benson, 4 B. & A. 586.

(*f*) *Infra*, p. 463.

(*g*) *Infra*, p. 465.

(*h*) *Infra*, p. 470.

(*i*) *Infra*, p. 473.

(*k*) *Infra*, p. 475.

(*l*) *Infra*, p. 477.

(*m*) *Infra*, 477.

(*n*) 2 Haw. C. 46, s. 179; 2 Ins. 318.

(*o*) *Ibid*.

(*p*) *Syer's case*, 3 Inst. 23, *R. v. Vane*, Keb. 164.

(*q*) *R. v. Minton*, East's C. P. 1021.

(*r*) See TRESPASS, and *supra*, 461. But upon the trial of a traverse of an inquisi-

Time.

If the facts *A.* and *B.* be each of them material, but their priority in point of time be immaterial, a variance from the priority as alleged will not be material (*s*) ; as, if a declaration on a policy of insurance allege that *after* the making the policy the ship sailed, when in fact she sailed *before* (*t*).

Where the consideration for a guarantee for 5,000 *l.* was alleged to be credit to be given by *C. & Co.* to *D. & Co.* in a manner *then* and there agreed upon between the parties, and the proof of the guarantee consisted in evidence of several letters from the defendant, in one of which he stated that he had given the guarantee for such arrangements as *might* be entered into, it was held that there was no variance from the legal effect (*u*).

In the same case, another count alleged the consideration for a guarantee for 8,000 *l.* to be that *C. & Co.* *would* give *V. and Co.* credit in manner *then* and there agreed upon, and it was held that there was no legal variance, although it appeared from the letters that *C. & Co.* had then credited *V. & Co.* to the amount of 5,000 *l.* of the 8,000 *l.* under the former guarantee (*x*).

But an allegation of an *executory* consideration is not satisfied by evidence of an *executed* consideration (*y*).

An allegation that a party is possessed for the remainder of a term of years, is satisfied by evidence that he is tenant from year to year (*z*), or for a fraction of a year (*a*).

Where the defendant in replevin avowed the taking as a commoner damage-feasant, and the plaintiff alleged that *J. S.* was seised of a house and land, whereto he had common, and that he demised to him to hold *from* the 25th day of March next before for a year, and the defendant traversed the lease *modo et formâ*, and the jury found that *J. S.* made a lease to the defendant *on* the

tion in the Exchequer, which found that a Crown-debtor was indebted to the Crown in a specific sum for duties due between two assigned periods, and it appeared in evidence that the debtor was indebted in a different sum for duties accruing for a different period, it was held that the period alleged might be rejected as surplusage. *R. v. Franklin*, 5 Price, 614.

(*s*) *Peppin v. Solomon*, 5 T. R. 496. *Young v. Wright*, 1 Camp. 139 ; Doug. 497. 515. *Matthie v. Potts*, 3 B. & P. 23. *Secus* where the time is material. *Abitbol v. Bristow*, 6 Taunt. 464.

(*t*) *Peppin v. Solomon*, 5 T. R. 496. *Young v. Wright*, 1 Camp. 139 ; Doug. 497. 515. *Supra*, note (*s*).

(*u*) *Irving & others v. Mackenzie*, 1 B. & B. 523.

(*x*) *Ibid*.

(*y*) 3 Lev. 98 ; Com. Dig. Action on the Case—Assumpsit, F. 6. An averment by way of consideration that *A.* had paid a sum of money, is not supported by evidence of consideration that *A.* would pay that money. *Amory v. Merryweather*, 2 B. & C. 573. *Secus*, where an *executed* consideration is alleged, and the law implies the duty. *Streeter v. Horlock*, 1 Bing. 34.

(*z*) *Botting v. Martin*, 1 Camp. 317.

(*a*) Lit. s. 67.

25th of March, for one year, it was held that the plaintiff was entitled to judgment (*b*).

The allegation of place is either merely formal, or it is descriptive; where it is merely formal, proof is unnecessary, even on indictments on criminal charges (*c*), and in actions for local offences it is sufficient to prove the offence to have been committed within the county (*d*). Place.

Where it is doubtful whether the allegation be merely formal, or it be descriptive, the allegation will be referred to *venue*, rather than to description (*e*), even although the action be of a local nature (*f*), and the existence of such a parish will be immaterial (*g*).

And where the place of doing an act is precisely alleged, if the description be *wholly immaterial*, the ground of charge or of complaint not being local, the description may, it seems, be rejected as surplusage. As, if a robbery be alleged to have been committed near a highway, when it was in fact committed in a dwelling-house, and not near a highway (*h*); or in a field near the highway, and the jury find that it was not committed near the highway (*i*); or in the dwelling-house of *A. B.* where the ownership cannot be

(*b*) Hob. 72; B. N. P. 300. The reason assigned is, that although the lease proved was not the same with that alleged, yet that the substance of the issue was, whether the plaintiff had such a lease as entitled him to use the common. But it was said, that he must not depart altogether from the form of the issue, as if it had been proved that he had a right of common by lease from *another*.

(*c*) 2 Haw. c. 46, s. 181; Salk. 288; 2 Hale, 291; Keb. 13. 33. By the provisions of the stat. 7 Hen. 5; 9 Hen. 5, c. 1; 18 H. 6, c. 12; if there be no such vill or place within the county, the indictment is void. The objection was taken in the case of *R. v. Goldsmith*, 3 Camp. 73, before Lawrence, J. on the Oxford Circuit, Summ. Assizes, 1808, and the learned Judge reserved the point; but the prisoner was afterwards acquitted. In *R. v. Dowling*, 1 R. & M. 433, on an indictment for highway robbery, it was held to be unnecessary to prove that such a parish as that alleged existed in the county.

(*d*) See *Warren v. Webb*, 1 Taunt. 371;

infra, 468, note (*q*); Cro. Eliz. 911; Yel. 12. In an action for running foul of posts fixed in a river supporting the plaintiff's wharf, it is necessary to prove the posts or wharf to be at the place alleged, under a *videlicet*. *Hamer v. Raymond*, 5 Taunt. 789. Vol. II. tit. NUISANCE.

(*e*) *Jefferies v. Duncombe*, 11 East, 226. Vol. II. tit. CASE, ACTION ON. 2 Camp. 3; 4 T. R. 561.

(*f*) 2 East, 437.

(*g*) 11 East, 226; 3 Camp. 3. *Kirtland v. Pounsett*, 1 Taunt. 570; where in an action for use and occupation, it was held to be unnecessary to state in what parish the premises are situate; and that if the parish be described by a wrong name, it is immaterial, if it be described by a name generally known, and which therefore could not mislead the defendant. But see *Wilson v. Clarke*, 1 Esp. C. 273; and *Pool v. Court*, 4 Taunt. 700.

(*h*) *R. v. Summers & others*, East's P. C. 785. *Fowler's case*, *ibid.* *R. v. Darnford & Newton*, *ibid.*

(*i*) *Wardle's case*, East's P. C. 785.

Place. proved (*h*), the variance is immaterial, for the statute takes away clergy generally.

(*h*) It was so^o held in *Pye's case*, (East's P. C. 785,) where the robbery was laid to have been committed in the dwelling-house of Aaron Wilday, and the robbery was proved, but it did not appear who was the owner, and the variance was held to be immaterial. So in *Johnston's case*, where the robbery was alleged to have been committed in the dwelling-house of Joseph Johnston, and it appeared that the robbery was committed by the prisoner, Sarah Johnston, in the dwelling-house of her husband, but his Christian name did not appear. East's P. C. 786.

But in *Duroure's case* (Leach's C. C. L. 200), where the prisoner was indicted under the Black Act for maliciously shooting at A. Sanders, in the dwelling-house of James Brewer and John Sanday, and it appeared that the Christian name of Brewer was not James but John, the variance was held to be fatal. But the words of the stat. (9 Geo. 1, c. 22,) are "who shall maliciously shoot at any person in any dwelling-house or other place." This case, which was decided by Hotham, B., seems to have been completely overruled by *Pye's case*, which was later, and decided by all the Judges.

It has been said, that where an injury is partly local, and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole; for the whole being one entire fact, the local situation becomes descriptive of the transitory injury (*R. v. Cranage*, Salk. 385.) The defendants were indicted for riotously assembling at the parish of St. Giles in the Fields, and breaking and entering the bed-chamber of Sarah S. in the dwelling-house of David James, and taking and carrying away thirty yards of stuff. Upon evidence, it appeared to be the dwelling-house of David Jameson; and Lord C. J. Parker held that the indictment could not be supported; and he said that this was not like the case 2 Roll. Ab. 667. And he cited *The Queen v. Sudbury*. Indictment for an assault and battery laid as a riot; two were acquitted, and two found guilty, and

all were acquitted; for the crime was the riot, and the whole offence was charged under that specification and description. So of the playhouse. Indictment for acting a play, and speaking obscene words in such a parish, in a playhouse in Lincoln's-Inn Fields; if there be no playhouse in Lincoln's-Inn Fields the defendant must be acquitted; for though the words are not local, yet these are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's-Inn Fields, then it had been laid as *venue*; but here it is otherwise, for here it is alleged as a description where the playhouse stood. In the principal case, part is local, and part is not local: the *cubiculum* is local; the taking and carrying away is not local; but all is put together as one entire fact, under one description, and you cannot divide them. See also 2 Haw. c. 46, s. 181, which cites the case of *R. v. Cranage*, and Fielding's Penal Law, 317; and lays it down too generally, that if an offence be laid in a parish, in the house of J. S., a variance will be fatal. This position, however, is contrary to the cases above cited, and is not warranted by the case of *R. v. Cranage*, Salk. 385, which was founded on the consideration that the offence was partly local.

And where a trespass to goods is connected with a local trespass, a transitory count has been held to be necessary in order to avoid locality. *Smith v. Milles*, 1 T. R. 475.

In Buller's N. P. 5, it is laid down, that if it be alleged in an action for slander that the defendant in *clausa ecclesie* Lichfield, spoke the words, the place being laid not as a *venue*, but as a description of the offence, must be proved. But a *quare* is subjoined in the margin. Yet notwithstanding the above authorities, considering that it is settled that a defendant may be found guilty of part of that with which he is charged, if it amount to an indictable offence, *qu.* whether he may not be convicted of that which is merely transitory, although the prosecutor fail as to the local part by reason of variance.

So in an action for running down the plaintiff's boat in the Thames, near the Half-way Reach, proof that it was done in the Half-way Reach is sufficient, the place being perfectly immaterial (*l*).

But it seems that wherever the allegation of place is descriptive of the terms of a contract, the proof must correspond with the averment.

Thus, if in an action against a carrier the contract be alleged to be to carry from *A.* to *B.*, the *termini* are material (*m*).

So where the defendant's tenancy of land in *F.* was alleged to be the consideration of his promise to treat it in a husband-like manner, and it was proved that the land was in *F.* and *C.*, the variance was held to be fatal (*n*).

See the case of *R. v. White*, East's P. C. 780; Leach's C. C. L. 286. *R. v. Woodward*, East's P. C. 780; Leach's C. C. L. 287; where, although it was held that the prisoners could not be found guilty, either of burglary, or under the stat. of Anne, of stealing in a dwelling-house to the amount of 40 s., by reason of variance in the name of the owner of the dwelling-house, yet it does not appear that the objection was held to extend to the simple larceny. And in *R. v. Davis*, East's P. C. 780, where the prisoner was acquitted of a burglary alleged to have been committed in the dwelling-house of William Pearce, and it appeared that it was the house, but not the dwelling-house of Pearce, the prisoner was recommended to mercy upon condition of transportation.

As a defendant may be convicted of the transitory part of an offence, though he be acquitted of the local part; and as it seems to be now established, that if the transitory part alone had been charged he might have been convicted, notwithstanding the variance from such local description, it seems to follow that he may be convicted of the transitory part alone, notwithstanding such a variance; for as neither mere locality alone, nor the omission to prove the whole of the charge, would have been fatal, it is difficult to conceive why the conjoint variance should be fatal.

(*l*) *Drewry v. Twiss*, 4 T. R. 558.

(*m*) *Tucker v. Cracklin*, 2 Starkie's C. 385. A declaration alleging a retainer, to

cause the plaintiff's ship to proceed to *Gottenburgh*, in order that she might afterwards proceed to *Petersburgh*, is not proved by evidence of a retainer to cause the ship to proceed to *Gottenburgh*, and afterwards, under particular conditions, to *Petersburgh*. *Lopes v. De Tastet*, 1 B. & B. 538. See also *White v. Wilson*, 2 B. & P. 116. In the case of *Frith v. Grey*, (4 T. R. 561, n.), in an action for not procuring the plaintiff a booth at a horse-race to be run on Barnet Common, in the county of *Middlesex*, it was proved that the whole of Barnet Common was in the county of *Hertford*. But Lord Mansfield and the rest of the Court, on a motion for a new trial, on the ground of variance, held, that as it was perfectly immaterial whether Barnet Common was in *Middlesex*, or not, those words might be rejected as surplusage. *Sed qu.*—Where the declaration was laid in tort, and stated the delivery of a parcel at *Chester*, in the county of *Chester*, to be carried to *Shrewsbury*, and it appeared that the delivery was at *Chester* within the county of the city of *Chester*, it was held that the variance was immaterial, no evidence being given that there was such a place as *Chester* within the county at large, and in common parlance *Chester* means *Chester* in the county of *Chester*. *Woodward v. Booth*, 7 B. & C. 301.

(*n*) *Pool v. Court*, 4 Taunt. 700; and see *Guest v. Caumont*, 3 Camp. 235. Vol. II. tit. USE AND OCCUPATION.

Place.

So in an action of covenant on a lease of coals, where the declaration alleged the lands to be situate in the parish of *B.* and *M.*, instead of in the parishes of *B.* and *M.* (*o*).

In trespass, every part of the description of the place is material, and must be strictly proved (*p*).

An action for a nuisance to the plaintiff's real property, whether corporeal or incorporeal, is local, and the action must be brought in the county where the property is situate (*q*).

But it is not necessary to describe the precise local situation either of the property injured, or of the gravamen (*r*).

And unless a precise description be given, the place mentioned will be ascribed to *venue*, and not considered to be descriptive (*s*).

But if in such case a precise local description be given, it must be proved as laid, and a variance will be fatal (*t*).

Proof that the place is usually and commonly known by the description used in the declaration is sufficient.

Where, in an action for a nuisance to the plaintiff's house, "at Sheerness, in the county of Kent," it was proved that the house was situated in the adjacent parish of Minster, but that both places were usually known by the name of Sheerness, it was held to be sufficient (*u*).

Where the local description of property within a parish is material, it is sufficient to prove it to be a parish by general reputation, having churchwardens and overseers belonging to it, although it be in fact but a hamlet (*x*).

And where premises are described to be situated in a particular parish, it is sufficient to prove that the parish is usually known by the name of description (*y*).

(*o*) *Morgan v. Edwards*, 2 Marsh. 96; *infra*, 470. But it was also held that an allegation that the lands were in the occupation of *A.*, *B.* and *C.*, instead of in the several occupations of *A.*, *B.* and *C.*, was sufficient.

(*p*) Per Lawrence, J. in *Vowles v. Miller*, 3 Taunt. 139. But it is sufficient to prove a trespass in some part of the place described, although other part belongs to the defendant. *Stevens v. Whistler*, 11 East, 51.

(*q*) *Mersey & Irwell Navigation Co. v. Douglas*, 2 East, 497. And where no local situation in such case is alleged, it will be presumed to be situate in the county specified in the margin (*Warren v. Webb*, 1 Taunt. 379.) Thus, an allegation

that the defendant suffered a spout to be out of repair at *A.* in the county of *B.*, is equivalent to an averment that it was situated there. *Warren v. Webb*, 1 Taunt. 379.

(*r*) *Mersey & Irwell Navigation Company v. Douglas*, 2 East, 497.

(*s*) *Ibid*.

(*t*) 2 East, 500, n. *Hamer v. Raymond*, 5 Taunt. 789. *Supra*, 467.

(*u*) *Burbige v. Jakes*, 1 B. & P. 225. And *semble*, the allegation might at all events have been referred to *venue*. *Supra*, 465.

(*x*) 2 Camp. 5, n. See *Kirtland v. Pounsett*, 1 Taunt. 570.

(*y*) *Kirtland v. Pounsett*, 1 Taunt. 570. *Goodtitle v. Walter*, 4 Taunt. 671. Per

And proof that the parish is usually described by the name of a Place. Saint, or by any another addition, which is omitted in the pleadings, will not be material (*z*).

In ejectment, the premises were alleged to be situate at Farnham, but were proved to be situate at Farnham Royal, and it was held to be sufficient, as it was not shown that there were two Farnhams (*a*).

So where the penalty in a conviction was adjudicated to the poor of the parish of St. Mary, Lambeth, but the offence was proved to have been committed in the parish of Lambeth, it was held to be sufficient, there being no evidence to show that there were two parishes of that name (*b*). And although there be two parishes of the general name, the general description will be sufficient (*c*).

But where, in trespass for breaking and entering a house situate in the parish of Clerkenwell, it was proved that there were two parishes in Clerkenwell, the one known by the name of St. John, the other by the name of St. James, but that the whole was generally known by the name of Clerkenwell, the description was held to be insufficient (*d*).

And where, in an action for an excessive distress, the premises were laid to be in the parish of St. George the Martyr, Bloomsbury,

Mansfield, C. J., in *Fowles v. Miller*, 3 Taunt. 140.

(*z*) In *Goodtitle v. Walter*, 4 Taunt. 671, the Court said that the case in which the variance between the parish of Chelsea and the parish of St. Luke, Chelsea, had been held to be fatal, (*Wilson v. Clerk*, 1 Esp. C. 293) had been overruled by the case of *Kirtland v. Pounsett*, 1 Taunt. 570. See *Morgan v. Edwards*, 6 Taunt. 394.

(*a*) *Doe v. Satter*, 13 East, 9. Where a conviction for performing a stage entertainment without licence, alleged the fact to have been done at the Coburg Theatre, in the parish of St. Mary, Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth, and the evidence stated that the theatre was in the parish of Lambeth, it was held to be no variance, for it did not appear that there were two distinct parishes so named. *R. v. Glossop*, 4 B. & A. 616.

(*b*) *R. v. Glossop*, 4 B. & A. 616. And note, that Lord Ellenborough said that the

variance would not be material in ejectment.

(*c*) *Doe d. James v. Harris*, 5 M. & S. 326. In that case a fine described the lands as situate in the parish of *Westbury*; there were two parishes of that name, *Westbury-on-Trym*, and *Westbury-on-Severn*, in the latter of which the premises were situate, and it was held that there was no variance. *S. P. Taylor v. Williams*, 3 Bing. 449. For the description is correct, as far as it goes; there is no variance, although the two parishes are usually distinguished by an addition.

(*d*) *Taylor v. Hoonan*, 1 Moore, 161. *Tamen qu.* The plaintiff was nonsuited; and a new trial was moved for on an affidavit stating that the whole district was generally known by the name of St. James, Clerkenwell, and statutes were referred to in which it was so described. Gibbs, C. J., observed, that the Acts referred to were not part of the public statutes; but the Court gave leave to amend, on payment of costs, by adding another count.

Place. and were proved to be in the parish of St. George, Bloomsbury, it was held that the description was improper (*e*).

Where the premises in ejectment were described as situated in the united parishes of St. Giles in the Fields, and St. George, Bloomsbury, and it appeared that the premises were in fact situated in the parish of St. George, Bloomsbury, and that the parishes were united by Act of Parliament for maintaining their poor, but for no other purpose, the variance was held to be fatal (*f*).

Where the premises in ejectment were alleged to be situate in the parish of West Putworth and Bradworthy, and it was proved that part were in the parish of West Putworth, and part in the parish of Bradworthy, it was held to be sufficient; and that the declaration was to be construed as alleging the premises to be so distributively situated (*g*).

In an action for non-residence, the description of the parish of St. Ethelburgh for Saint Ethelburgha, is fatal (*h*).

An allegation that *A. B.* was a constable of the parish of St. Paul, Covent Garden, is not satisfied by evidence that he was presented as a fit person to serve as constable for that parish, but sworn in to serve for Westminster generally (*i*).

Name. As natural persons, as well as aggregate corporate bodies, must be described by name, an allegation of the name of any such person or body, whose existence is essential to the claim or charge, is necessarily *descriptive*, and consequently a variance is generally fatal. Where, however, the name of a party to the action or indictment is mistaken, the objection must be taken by plea of the misnomer in abatement, and cannot be taken by a plea in bar (*j*).

Misnomer. Where a corporation was sued by the name of the Mayor and Burgesses of Stafford, and, on production of the charter, it appeared that they were "The Mayor and Burgesses of the borough of Stafford, in the county of Stafford," the Court held that the variance was not fatal, under a plea of not guilty to a declaration in case, but that the misnomer might have been pleaded in abate-

(*e*) *Harris v. Cooke*, 2 Moore, 587. The Court said that it should have been described by its known and popular name, and not by its general description; St. George, Bloomsbury, was dedicated to king George the 1st, and St. George the Martyr is quite a distinct parish.

(*f*) *Goodtitle d. Pinsent v. Lammerman*, 2 Camp. 274.

(*g*) *Goodtitle d. Brembridge v. Walter*, 4 Taunt. 671. See the case of *Morgan v. Edwards*, 2 Marsh. 96; *supra*, 468. In the latter case the evidence varied from the written description in the lease.

(*h*) *Wilson v. Gilbert*, 2 B. & P. 281.

(*i*) *Goodes v. Wheatley*, 1 Camp. 231.

(*j*) *Morley v. Law*, 2 B. & B. 34. See *Gardner v. Walker*, 3 Ans. 935.

ment (*k*). But if there be no such corporation the objection is *Misnomer*. available in bar (*l*).

Upon the trial of an ejectment on the demise of the mayor, &c. of the borough town of Maldon, it appeared from the charter that they were incorporated by the description of the mayor, &c. and commonalty of Malden; and it was held that the variance was immaterial, the charter showing that Malden was a borough town (*m*).

The misnomer of persons whose existence is essential to the charge or claim is usually a fatal variance. Of persons.

An indictment charging the prisoner with having personated M'Cann, is not satisfied by proving his personation of M'Carn (*n*).

So Couch for Crouch is a fatal variance, in the description of a party to a bill of exchange (*o*).

So a misdescription of a name of dignity will be fatal.

The declaration in an action for a malicious prosecution alleged that the defendant went before *R. C.* baron Waterpark, of *Waterfork*, in the county of *A.*; the proof was, that he went before *R. C.* baron Waterpark, of *Waterpark*, in the county of *A.*; and the variance was held to be fatal (*p*).

An allegation that *J. S.*, otherwise *R. S.*, made a deed, is not supported by evidence that *J. S.* made a deed by the name of *R. S.* (*q*).

(*k*) *Mayor and Burgesses of Stafford v. Bolton*, 1 B. & P. 40. In an action for stock, the South Sea Company were described as trading at *Maria Austral*, and it was held that the variance was fatal; but the plaintiff had leave to amend. *Turvil v. Agneworth*, Str. 787; *infra*, 478.

(*l*) *Ibid.* and Bro. Misn. 73.

(*m*) *Doe v. Miller*, 1 B. & A. 699. And see the cases of the *Dean and Chapter of Carlisle*, 10 Co. 124; of the *Dean and Canons of Windsor*, *ibid.* *Dr. Agray's case*, 11 Co. 19; Cro. Eliz. 816.

(*n*) *R. v. Tassett*, cor. Wood, B., Kent Lent Ass. 1818, and afterwards before the Judges. *Turbart* for *Tabart* is a fatal variance in a bail-piece (*Bingham v. Dickie*, 5 Taunt. 514.) So if the plaintiff on a bail-piece be described as Christian Nicholas Veun, instead of Daniel Nicholas Venn; they are not bail in the cause, and the Court will not amend the bail-piece, but give judgment on the plea of *nul tiel record*. *Venn v. Warner*, 3

Taunt. 263. So *Shakpear* for *Shakespear*, on a plea in abatement. If a defendant be arrested by a wrong Christian name, as *Berend* for *Bernard*, the Court will discharge him on motion (*Wilks v. Lorck*, 2 Taunt. 399). See also *Smith v. Innes*, 4 M. & S. 360. So where a party having two Christian names is sued by one only (*Arboun v. Willoughby*, 1 Marsh. 477.) *Secus*, where he has dealt with the party by the name by which he is sued (*Walker v. Willoughby*, 6 Taunt. 530; S. C. 2 Marsh. 230); or where the name is *idem sonans*, as *Benedetto* for *Beneditto*. *Abitbol v. Benedetto*, 2 Taunt. 401. See *R. v. Foster*, Russ. & Ry. 412.

(*o*) *Whitwell v. Bennett*, 3 B. & P. 550. So if in an action on the statute of usury, a bill of exchange be alleged to be drawn on *John K.* instead of *Abraham K.* *Hutchinson v. Piper*, 4 Taunt. 810.

(*p*) *Walters v. Mace*, 2 B. & A. 756.

(*q*) *Hetchman v. Shotbolt*, Dyer, 277 b, pl. 9.

Misnomer
of persons.

So a declaration against a party in his right name, alleging that he executed a bond in a different name, is bad (*r*).

The description of a peer of Ireland by his christian and *family* name and *title*, was held to be sufficient, the insertion of the surname being no variance, for the Court will not intend the two to be only his christian name (*s*).

If the plaintiff allege that a promissory note was made payable to him, or that a promise was made to him, and on proof of the instrument or contract it appears to have been made to another, it is no variance if the plaintiff show that he was the person really meant, for that is the legal effect (*t*).

Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true.

Upon an indictment for an assault upon *Elizabeth Edwards*, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made upon the daughter; and the conviction was held to be good (*u*).

But a description of persons by the name by which they are commonly known is usually sufficient.

Proof that certain officers in the town of *A.*, within the parish of *B.*, have always been called the churchwardens of *A.*, is sufficient to warrant the description of them as the churchwardens of *A.* (*x*).

And proof that the name alleged is the reputed name, is usually sufficient.

When an indictment charged the prisoner with having stolen the property of *Victory*, baroness Turkheim, the prosecutrix; and the proof was that her real name was *Selina Victoire*; that baroness Turkheim was her real title, but that she was usually known by the name of Baroness Turkheim; the Judges held that the description was sufficient (*y*).

(*r*) *Gould v. Barnes*, 3 Taunt. 504.

(*s*) *Rex v. Brinklett*, 3 C. & P. 416.

(*t*) *Willis v. Barrett*, 2 Starkie's C. 29.
Moller v. Lambert, 2 Camp. 548. And
see *Bass v. Clive*, 2 M. & S. 282. *Secus*,
in the case of a writ. *Scandover v.*
Warne, 2 Camp. 270, or specialty.

(*u*) *R. v. Pearce*, 3 B. & A. 579. But
if father and son be both called *A. B.*, by
A. B. simply the father shall be intended.
Lepiot v. Brown, 1 Salk. 7. *Wilson v.*
Stubbs, Hob. 330. *Succeting v. Fowler*,

1 Starkie's C. 106. tit. BILLS OF EX-
CHANGE.

(*x*) *Stead v. Heaton*, 4 T. R. 669.

(*y*) *Sull's case*, Leach, 1005. See also
Mary Graham's case, Leach, 619. On
an information for offering a bribe to one
T. D., an officer of the customs, to allow
bugles to pass, held that it was no variance
that the officer's name was *T. T. D.*, and
not merely *T. D.*, it being in evidence that
he generally went by the latter name, nor
secondly, that the articles were beads, and

It is sufficient if the name be *idem sonans*: on an indictment for assaulting John Whyneard, the evidence was of an assault on one who spelt his name Wynyard, but it was commonly pronounced Winniard, and the conviction was held to be right (z). Mismomer of persons.

The mismomer of a party to the proceeding, whether civil or criminal, can usually be taken advantage of by plea in abatement only, and is immaterial where the defendant pleads in bar.

And where a defendant in assumpsit has let judgment go by default, the other defendants cannot take advantage of a mismomer of that defendant, proof being given that he has been served with process (a).

Where the defence to an action by *Elizabeth H.* was, a judgment against the defendant, as garnishee, in the mayor's court, in an action against the present plaintiff, in which she was called *Eliza H.*, satisfaction having been entered, it was held that the variance was not material, proof having been given that she was known by the name of *Eliza*, as well as by that of *Elizabeth* (b).

If plaintiffs describe themselves as the assignees of *A.*, proof that they are assignees under a joint commission against *A.* and *B.* is no variance (c). Character.

To satisfy an allegation that a party did a particular act, it is sufficient to prove that the act is his in legal effect. Act.

In an action of debt against *B.* alone, on a joint bond of *A.* and *B.*, where *B.* pleads payment, proof that *A.* paid the debt will support the issue (d).

Debt on bond against the executors of *Stalwood*; plea that *Hicks* was a co-obligor, and that on a day specified *Hicks* and *Stalwood* paid the money; it was held that this was proved by evidence that *Stalwood* paid one half during his life, and *Hicks* the remainder after his death (e).

In an action on the case against the master of a ship for loss of goods, it was alleged that the plaintiff was to pay the defendant, Parties.

not bugles, it appearing that the defendant himself had treated them as bugles, and that they were usually called by that term; held also, that an entry of customed goods by bill of sight, under 6 Geo. 4, c. 107, s. 23, obtained by fraud, was no protection to the landing without entry. *Attorney-General v. Hawkes*, 1 C. & J. 121; and 1 Tyrw. 3.

(z) *R. v. Foster*, Russ. & Ry. C. C. L. 412. But where the indictment charged the murder of George Lakeman Clarke, a bastard child which had been christened

by the name of George Lakeman, the mother's name being Clarke, but the child had not acquired her name by reputation, it was held to be a mismomer. *R. v. Clarke*, 1 Russ. & Ry. C. C. L. 355.

(a) *Dickenson v. Bowes*, 16 East, 110.

(b) *Huxham v. Smith*, 2 Camp. C. 10.

(c) *Harvey & others v. Morgan*, 2 Starkie's C. 17. Vide Vol. II. tit. TROVER.

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(d) P. C. Ann. 133.

(e) *Groves v. The Executors of Stalwood*, Ann. 133.

Act.
Parties.

but the jury found that the plaintiff was to pay the shipowners, and that the latter were to pay the defendant; and the Court held that the allegation was supported, since the plaintiff did in effect pay the defendant (*f*).

In an action by the consignor of goods against the carrier, on an undertaking to carry them for a certain hire and reward, to be paid by the plaintiff, proof of an agreement, as between the consignor and consignee, that the latter shall pay the carriage, does not disprove the allegation, the consignor being in point of law liable to the defendant (*g*).

An allegation in an action on an indemnity bond, that *A.* and *B.* (the parties indemnified) advanced certain money to *D.*, is satisfied by proof of the advance of the money by *A.*, *B.* and *C.*, the latter being a dormant partner (*h*).

Where the fact alone is material, and the agent immaterial, a variance as to the latter will not be fatal. If a declaration on a bill of exchange aver a presentment by *A. B.*, it is sufficient to prove a presentment by another (*i*).

In all civil cases, and in prosecutions for misdemeanors, it is a general rule, that an allegation that a party did an act is sustained by evidence that he caused it to be done by another, according to the well-known maxim *qui facit per alium facit per se*.

In an action against *A.* for damage occasioned by his negligence in driving a carriage, it is sufficient to prove that the damage was occasioned by the negligence of his servant (*k*).

An averment that the defendants accepted a bill of exchange is satisfied by evidence of an acceptance by their authorized agent (*l*).

But an allegation that the plaintiff employed *A.* to repair damage to a house, and to alter a room, is not supported by evidence that an insurance company employed *A.* to repair, and that the plaintiff employed him to alter the room (*m*).

An allegation that *A.* sold a chattel to *B.* by writing, is not

(*f*) *Morse v. Stall*, 1 Ventr. 238.

(*g*) *Moore v. Wilson*, 1 T. R. 659. And see *Jordan v. James*, 5 Burr. 2680. *Vale v. Bayle*, Cowp. 294.

(*h*) *Harrison v. Fitzhenry*, 3 Esp. C. 238.

(*i*) *Boehm v. Campbell*, 1 Gow. 55.

(*k*) *Brucker v. Fromont*, 6 T. R. 659. If *A.* and *B.*, being carriers, horse a cart each for his own share of the road, they are jointly liable for the negligence of the

servant of either. *Waland v. Elkins*, 1 Starkie's C. 272. But as to allegations that the principal has subscribed an instrument, which has in fact been subscribed by an agent, see *Levy v. Wilson*, 5 Esp. C. 180. *Helmsley v. Loader*, 2 Camp. 450; Vol. II. tit. AGENT.

(*l*) *Heys v. Heseltine*, 2 Camp. C. 604. See *Coare v. Giblett*, 4 Esp. C. 231.

(*m*) *Witherington v. Buckland*, Ann. 309.

proved by evidence that *B.* was the purchaser at an auction, and that *A.*'s agent wrote *B.*'s name, as the buyer, in the printed catalogue, and that *B.* gave his promissory note for the sum (*n*).

Act.
Parties.

An averment of an agreement to deliver goods to *A.* is not proved by evidence of an agreement to deliver goods to the bearer of a receipt for the goods given by the defendant (*o*).

Where the consideration was alleged to be the releasing certain goods distrained for rent to the tenant, and evidence was given of a promise on consideration of returning the goods to the plaintiff, the variance was held to be fatal (*p*).

In an action for an amercement in a court-leet, an allegation that the court was held before the steward is not proved by evidence that it was held before his deputy (*q*).

An averment of an absolute assignment, alleged as a consideration for a promise, is not supported by proof of a qualified assignment (*r*).

Where a wrongful act and an injurious consequence are alleged, the consequence must be shown to result immediately from the act; it is not sufficient to connect the act with a remote consequence, by evidence of intermediate causes.

Conse-
quence.

Where the plaintiff alleged that the defendant placed and continued a heap of earth, by means of which the refuse-water was prevented from flowing from the plaintiff's house to a certain ditch, and the proof was that the earth had been so placed originally as not to obstruct the water, but that in process of time the earth was trodden down, and fell into the ditch, and obstructed it, it was held to be a variance (*s*).

An allegation that the defendant diverted and turned a stream of water, is not proved by evidence that by interrupting its course and penning it back he caused it to overflow the plaintiff's premises (*t*).

An allegation of damage from the unskilful steerage of the defendant's ship, is not satisfied by evidence of damage from the improper stowing of the defendant's anchor (*u*).

(*n*) *Symonds v. Ball*, 8 T. R. 151.

(*o*) *Samuel v. Darch & others*, 2 Starkie's C. 60.

(*p*) *Goodson v. Leary*, 4 T. R. 487.

(*q*) *Wyvill v. Shepherd*, 1 H. B. 162. For *semble*, a deputy cannot be appointed without special authority, under a particular grant, or by established usage. See 4 Ins. 88. And see *Gery v. Wheatley*, 1 H. B. 163, n.

(*r*) *Vansandau v. Burt*, 1 Moore, 42.

(*s*) *Fitzsimmons v. Inglis*, 5 Taunt. 534.

(*t*) *Griffiths v. Marson*, 6 Price, 1; and see *Williams v. Morland*, 2 B. & C. 510.

(*u*) *Hullman v. Bennett*, 5 Esp. C. 226.

Act.
Conse-
quence.

If the declaration allege as special damage, that the plaintiff gave bail to the sheriff at the return of the writ, it is not proved by evidence that he paid the debt, and 10 *l.* for costs, into the hands of the sheriff (*x*).

But where the declaration alleged that the defendant erected a dam and diverted a watercourse, and prevented the plaintiff from having the use, &c., this was held to be sufficient, although the effect of erecting the dam was not to *divert* the water, but to prevent its flowing in sufficient quantities (*y*).

Agent.

A variance as to the number of agents seems to be immaterial, unless the number, from the nature of the case, operate by way of description of the charge or claim.

Number of
parties.

If *A.* be indicted as accessory to *B. & C.* he may be convicted on proof that he was accessory to a felony committed by *B.* alone, or by *B. & C.* together with *D.* (*z*).

A livery to one of several feoffees is a livery to all (*a*).

An allegation in perjury, that the oath was taken before *E. W.* one of the justices of assize, is proved by evidence that it was taken before *E. W.* and another justice of assize (*b*).

In general, in actions for torts, it is sufficient if the injury be proved to have been committed by one only of the defendants, who may be convicted, and the rest acquitted (*c*).

Where three promise to do an act upon request, a request to one is a request to all (*d*); and notice to one is notice to all (*e*).

Where it was alleged that differences depended between six persons, partners, and it appeared that three of the partners had given a joint and several bond to the other three, conditioned for the performance of the award, and that the latter had given a similar bond to the former, in which it was recited that differences existed between the above bounden three and the above named three, it was held to be no variance (*f*).

An allegation in an indictment of perjury, that *A.* filed his bill (upon the answer to which perjury is assigned) against *B.* and

(*x*) *Bristow v. Haywood*, 4 Camp. 213.

(*y*) *Shears v. Wood*, Moore, 345. Case, for so negligently pulling down a party-wall that plaintiff's cellar was weakened and fell in, and his wine destroyed: the proof was, that the injury was caused by the defendant's placing a quantity of bricks, in pulling down the wall, on the cellar, *per quod*, &c. and the variance was held to be immaterial. *King v. Williamson*, 1 D. & R. 35.

(*z*) *Crim. Pleadings*, 148, 9.

(*a*) *Co. Litt.* 48; *Com. Dig.* Feoffment, B. 2.

(*b*) *R. v. Alford*, Leach's C. C. L. 179.

(*c*) Vol. II. tit. PARTNERS.—VARIANCE.

(*d*) *Brereton's case*, Noy, 135; Vin. Ab. T. b. 97.

(*e*) *Com. Dig.* Condition, L. 9.

(*f*) *Winter v. White*, 3 Moore, 674.

another, is satisfied by proof of a bill filed against *B.*, *C.* and *D.*, the perjury being assigned on a fact which is material as between *A.* and *B.* only, and it seems that it would have been sufficient to allege that it was filed against *B.* only (*g*). Act.
Number of
parties.

If the act itself which is the foundation of the claim or charge be proved, it seems that allegations as to the manner of doing it, laid by way of aggravation, may be rejected. Thus upon a charge of murder the act is laid to have been done *wilfully* and of *malice aforethought*, yet, although neither of these allegations be proved, the prisoner may be convicted of manslaughter (*h*). Allegation
of motives
and inten-
tion.

So if a libel be alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular magistrates, the defendant is liable to be convicted if a publication with either of those intentions be proved against him (*i*).

Upon an indictment charging the defendant with assaulting a female child, with intent to abuse and carnally to know her, he may be convicted of the assault with intent to abuse her, although the jury negative the rest of the intention (*k*).

If slanderous words be alleged to have been spoken with intent to injure the plaintiff in two trades, it is not a fatal variance if it turn out that the intent was to slander him in one of them only (*l*).

Variances in the proof of a written instrument may be considered, 1st, Where it is set out by the *tenor*, &c.; 2dly, Where it is described in *substance* and *effect*; 3dly, Where it is vouched in proof of particular facts by a description of its date, names of parties, &c.; 4thly, Where a fact is simply alleged, without vouching the instrument, and the instrument is used but as evidence. Previously to stating the decisions applicable to this branch of the inquiry, it may be proper to observe, that by a late wholesome statute, power is given to Courts of Record to amend the record in a civil action, or prosecution for a misdemeanor, in case it vary from a writing produced in evidence to support it (*m*). Written
instrument.

In general, where a party is bound, either by the nature of the case, or by his own allegation, to strict proof of a written document, any variance which affects the sense will be fatal; but a

(*g*) *R. v. Benson*, 2 Camp. 501, cor. Lord Ellenborough.

(*h*) 2 Hale, 246; *Fost.* 329.

(*i*) *R. v. Evans*, cor. Bayley, J. *Lanc. Sp. Ass.* 1821.

(*k*) *R. v. Dawson*, cor. Holroyd, J. *York Sum. Ass.* 1821.

(*l*) *Figgins v. Cogswell*, 3 M. & S. 369.

(*m*) See below.

Written
instrument.

mere variance in the spelling of a word will not be material unless the word be thereby altered into one of a different meaning (*m*).

The words, "*to the tenor following*," or "*as follows*," or "*in the words and figures following*," bind to an exact recital (*n*).

Under such an allegation the insertion of the word *nec* instead of *non* (*o*), *air* for *heir* (*p*), would be fatal; but a variance of the word *abby* for *abbey* (*y*), or in an indictment for perjury, of *undertood* and *believed* for *understood* and *believed* (*r*), would not be material.

A variance in a name contained in an instrument so set out, or in a record on a plea of *nul tiel* record, will be fatal, as of *Crawley* for *Crowley* (*s*), *Ansty* for *Anesty*, *Shartless* for *Sharpless* (*t*), *Shutliff* for *Shirtliff* (*u*), unless, as it seems, the name be *idem sonans*, as *Segrave* for *Seagrave* (*x*).

And so it is where a name is alleged which is to be proved by a record, or other written instrument (*y*).

An allegation that it was presented in an indictment *in manner and form* following, does not bind to an exact proof; and therefore, where the indictment set out under that allegation omitted the word *despaired*, it was held that the variance was not material (*z*).

Oyer of
condition of
bond.

If the condition of a bond be set out on oyer, a variance from the tenor will be fatal. Thus where, on oyer, the condition was, that if the defendant should pay to the plaintiff the full sum of 100 *l.* by six equal payments, &c., and under the plea of *non est factum* the evidence was, that the word *hundred* had been omitted in the bond, and had been interlined in it after execution, the variance was held to be fatal, although it was clear, from the context, that the word *hundred* was intended (*a*). Where a profert

(*n*) Vol. II. tit. FORGERY.—LIBEL. Crim. Pleadings. 100, 2d edit. Doug. 194; Cowp. 230; Salk. 660.

(*n*) Doug. 97. *R. v. Powell*, 2 Bl. R. 768; Salk. 660; Hob. 272; 8 Co. 78; Co. Ent. 508; 2 Saund. 121; Dyer, 75. *Lady Ratcliffe v. Shubly*, Cro. Eliz. 224. *Blissett v. Johnson*, Cro. Eliz. 503; 2 Roll. Abr. 708; *supra*. tit. LIBEL.

(*o*) Salk. 660.

(*p*) *Abney v. Wallace*, Str. 201. 231.

(*q*) Ibid.

(*r*) *R. v. Beach*, Cowp. 229.

(*s*) 12 Ass. pl. 2.

(*t*) Bro. Var. 20.

(*u*) *Gordon v. Austin*, 6 T. R. 611. See also *R. v. Shakespear*, 10 East, 83.

(*x*) 2 Str. 880. Under the stat. 2 Will. 4, c. 39, s. 4, a copy of a *capius* will be insufficient, if any word be so written as to vary from the original in sense or sound, as if *Middesex* be written for *Middlesex*. *Hodgkinson v. Hodgkinson*, 1 Ad. & Ell. 533.

(*y*) *Turvil v. Aynsworth*, Str. 787. The plaintiff declared for stock in the company trading ad *Maria Austral*, vocat, the South Sea Company; and after great debate it was held that the variance between *Austrial* and *Austral* was fatal, but the plaintiff had leave to amend.

(*z*) *R. v. May*, Doug. 183.

(*a*) *Waugh v. Bussell*, 5 Taunt. 707. *Secus*, where the substance only is alleged

is made of an indenture of demise, proof of the counterpart is sufficient (*b*).

Written instrument.

If a public statute be misrecited, the Courts will take notice of the variance, and it will be fatal (*c*); but they will not notice a variance in a private statute unless it be pleaded (*d*).

Where in setting out a statute the word *or* is used instead of the word *and*, the mistake will be fatal (*e*), unless the word *or* in the statute has always been construed to mean *and* (*f*).

Secondly, when the instrument is described merely by its substance and effect, it is sufficient to prove it by one which corresponds in legal effect.

Legal effect.

In debt on bond, the plaintiff alleged that the defendant acknowledged himself to be bound to *Richard Bishop*; on oyer it appeared that the defendant acknowledged himself to be bound to *Richard* — to be paid to the said *Richard Bishop*; and on demurrer the Court held that this was no variance, for the word *said* pointed out the relation of the names so immediately that it was impossible to doubt but that the bond was made to the person to whom the money was payable (*g*).

The declaration averred that a note was payable to *B.* or order, and alleged an indorsement as payable to *C.* or order, and on production of the note the indorsement was, Pray pay to *C.*; it was held that there was no variance in substance, for by the indorsement it was payable as alleged (*h*).

and oyer is not demanded. 1b. And Gibbs, C. J., observed, that C. B. Comyns, in 5 Com. Dig. Obligation, B. 4, had misunderstood the case *Cull & Ux. v. Sarvine*, when he says, that if the declaration be upon a bill that he will pay, and the bill says, "if he pay," the variance will not be material; and that what was really decided in that case was, that the mis-spelling, by adding an e final to the name of the widow Sarvine, did not thereby vitiate the obligation.

(*b*) *Pearce v. Morris*, 2 B. & Ad. 396.

(*c*) *Boyce v. Whitaker*, Doug. 97.

(*d*) *R. v. Wilde*, 1 Lev. 206; Doug. 97; 1 Salk. 330; 1 Lord Ray. 318.

(*e*) *R. v. Mursack*, 6 T. R. 771. See the *Attorney-General v. Horton*, 4 Price, 237, where *thereout* for *thereon* was held to be an immaterial variance.

(*f*) Ibid.

(*g*) *Bishop v. Morgan*, 11 Mod. 275. See also *Waugh v. Bussell*, 5 Taunt. 707.

In an action on the case for detaining a bond alleged to have been given by Lord *Gave*, upon *non assumpsit* pleaded, a bond was given in evidence executed by Lord *Gage*; and the Court of C. B. held that the variance was not material. *Alcorn v. Westbrook*, 1 Wils. 115; but it seems from the report, that although the declaration alleged the name to be *Gave*, yet in other parts it was stated to be *Gage*. If in setting forth the substance and effect a blank be supplied, and a meaning be thereby added which is not actually supplied by any terms contained in the instrument itself, the variance will be fatal. An indictment for perjury alleged that the defendant swore in substance and effect, "that *A.* assaulted her, and at the same time threatened to shoot her;" the word *time* was omitted in the affidavit, and the variance was held to be fatal. *R. v. Murry Ann Taylor*, 1 Camp. C. 404.

(*h*) B. N. P. 275.

Written
instrument.
Legal
effect.

Where the declaration was on a note promising to pay a sum of money and interest, and the proof was of a note entitled in a cause with a promise to pay the debt and costs, it was held to be sufficient (i).

So where the declaration alleged a bond for 40 *l.* to be paid to the plaintiff, and on oyer of the bond it was to be paid to his attorney or assigns, the Court, on demurrer, held the variance to be immaterial, for payment to the plaintiff or his attorney was the same thing; the *teneri* made it a debt to the plaintiff, and a *solvend* to any one else would be repugnant (k).

In an action by the husband alone, on a bond alleged to be given to him, he gave evidence of a bond to himself and his wife; and this was held to be no variance, for he had a right to reject the obligation to his wife, and in legal import it was a bond to himself (l).

So where, in covenant, a lease was alleged to have been made by the plaintiff on the one part, and the defendant on the other, and the lease proved under the plea of *non est factum*, was by the plaintiff and his wife of lands the property of the wife before marriage (m).

In an action against the high bailiff of Westminster for a false return to a writ of *fi. fa.*, the plaintiff alleged a warrant to levy 200 *l.* of the goods of *A. U.*, which the plaintiff had recovered against *A. U.* He proved a *fieri fucias* to that effect, and a warrant to levy 200 *l.* of the goods and chattels of *A. U.*, which the plaintiff had recovered against —; and it was held that the allegation was satisfied, for the name might be supplied by reference (n).

So where the declaration on a bond alleged that the defendant acknowledged himself to be bound in so many pounds, on the production of the bond it appeared that the word pounds in the obligatory part was omitted, but it being manifest from the condition of the bond that pounds were meant, it was held that the omission might be supplied (o).

A declaration for maliciously holding to bail, in setting out the judgment in the former action, stated, "it was thereupon considered that the then plaintiffs should take nothing by their said

(i) *Cotbms v. Ingram*, 4 D. & R. 216.

(k) *Salk*. 659.

(l) *Ankerstein v. Clarke & others*, 4 T. R. 616. Although the bond was given to the wife as administratrix. *Ibid.* And see *Arnold v. Revault*, 1 B. & B. 442. *Beaver v. Lane*, 2 Mod. 217.

(m) *Arnold v. Revault*, 1 B. & B. 443; 4 Moore, 66. *Beaver v. Lane*, 2 Mod. 217.

(n) *King v. Morris*, Str. 909; Fitzg. 198; 1 Ford, 85. See also *Hendray v. Spencer*, cited 1 T. R. 238; and Vol. II. tit. SHERIFF.

(o) *Coles v. Hulme*, 8 B. & C. 508.

writ, but that they and their pledges to prosecute should be in mercy," &c. In the record of the former judgment the words "and their pledges to prosecute" were omitted, and it was held that the words might be rejected as surplusage (*p*). Written instrument. Legal effect.

A declaration in setting out the condition of a bail-bond stated, that if the defendant should appear to answer the plaintiff, *according to the custom of his Majesty's court of Common Bench*, then the obligation should be void; on the production of the bond it appeared that the words in italics were omitted, but this was held to be no variance, as the legal effect was averred (*q*).

An avowry alleged certain rent to be due under a demise, and certain further increased rent for breaking up land into tillage. It appeared from the lease that the increase of rent was confined to the last three years, and the rent was, in fact, claimed in respect of part of the last three years, and the Court held that under the statute (*r*) this was no variance, the mere effect and operation of the demise being stated (*s*).

In an action for false imprisonment, the declaration, in setting forth the bill of Middlesex, alleged that the sheriff was commanded to take *A. B.* (the then defendant) and *John Doe*, if, &c., and them, &c. The bill produced was in words at length, and it was held to be no variance, for it was sufficient to set out the substance; and there was no variance between what was set out and the bill of Middlesex produced (*t*).

Where in proceeding against bail above, and *nul tiel* record pleaded to a replication, which alleged a *capias ad satisfaciendum*, returnable *Coram Rege apud Westm.*, a *ca. sa.* was produced, returnable *Coram Rege ubicunque*, &c., it was held to be no variance (*u*).

In an action against the sheriff for misconduct in the sale of the plaintiff's goods, under a *fieri facias*, the plaintiff, in stating the substance of the writ, alleged that the sheriff was commanded to levy 80*s.* awarded to *J. C.* for his damages sustained, by

(*p*) *Judge v. Morgan*, 13 East, 547. Although the judgment was pleaded with a *prout patet*. Note, that Lord Ellenborough observed that there was an &c. in the record. See *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984; *infra*, 488.

(*q*) *Bonfellow v. Steward*, 3 Moore, 214.

(*r*) 11 Geo. 2, c. 19.

(*s*) *Roulston v. Clarke*, 2 H. B. 563.

(*t*) *Wilson v. Mawson*, cor. Lee, C. J., cited 1 T. R. 237.

(*u*) *Roberts v. Price*, 1d. Raym. 702. And see *Shuttleworth v. Pilkington*, 2 Str. 1155, cited by Buller, J., 1 T. R. 240; where it was held that the omission of *ubicunque* in a bail-bond was not material; for that by appearing before the King, was meant the appearing before the King in his court, and not in person.

Written
instrument.
Legal
effect.

So where a word in the declaration has been mis-spelt, and the mistake and the word really intended plainly appear from the context, the variance will not be material. As where a lease granted liberty to make levels, pits and soughs, and the declaration in covenant stated it to be a liberty to make *sloughs* (*k*).

Variance
from legal
effect.

But in general a description of an instrument, or an averment to be proved by an instrument, contrary to its legal effect, will be fatal (*l*); as, if the plaintiff declare on a lease by *A.* and *B.*, and the proof be that *A.* being tenant for life, remainder to *B.* in fee, they both joined in a lease to the plaintiff (*m*): for during the life of *A.* it is the lease of *A.* and the confirmation of *B.*, and after the death of *A.* it is the lease of *B.* and the confirmation of *A.*

So if a party make a deed granting rent, which under the circumstances operates as a covenant to stand seised, if it be pleaded as a grant of rent the variance would be fatal (*n*).

An allegation of a grant of an unqualified interest, is not proved by evidence of a qualified grant of such interest as the title of the plaintiff, as a shareholder, permitted (*o*).

If in an action of debt or recognizance of bail, the recognizance be alleged generally, and on *nul tiel* record pleaded it appear to be a recognizance with a condition annexed, the variance would be fatal (*p*).

Debt on bond conditioned for performance of an award; plea, no award; replication, setting out an award; rejoinder, no such award. If it appear in evidence that a material part of the award has been omitted, the variance will be fatal (*q*). But it is otherwise if the part omitted be void (*r*).

So if the covenant be stated as absolute which is but limited; as, if a covenant for repairing contain an exception of casualties by fire, and be stated without such exception (*s*).

(*k*) *Morgan v. Edwards*, 6 Taunt. 394.

(*l*) See *Scandover v. Warne*, 2 Camp. 270.

(*m*) *Treport's case*, 6 Co. 15.

(*n*) Carth. 308. See also *Baker v. Lade*, 3 Lev. 291; 2 Will. Saund. 97, b. note (2). *Taylor v. Vale*, Cro. Eliz. 166; Str. 432.

(*o*) *Earl of Portmore v. Bunn*, 1 B. & C. 694. *Adam v. Duncalfe*, 5 Moore, 475. There can be no variance from the legal effect when the terms of the instrument itself are set out. *Ross v. Parker*,

1 B. & C. 358. Nor in general where the allegation corresponds *with the fact*; as where an act is truly stated to have been done by the under-sheriff, although, in point of law, it be the act of the sheriff.

(*p*) Per Powel, *J. Ward v. Griffith*, Ld. Raym. 83.

(*q*) *Foreland v. Hornigold*, Lord Raym. 715.

(*r*) Ibid.

(*s*) *Brown v. Knill*, 2 B. & B. 395. *Howell v. Richards*, 11 East, 633. And see *Tempany v. Barnard*, 4 Camp. 20. *Secus*, where the qualification is no part

Where in debt for an amercement the declaration alleged that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons proved was to serve on the jury of the court-leet only, the variance was held to be fatal (t).

Written instrument. Variance from legal effect.

An allegation that the plaintiffs by the judgment of the Court recovered against the bail, with a *prout patet*, is not proved by the production of the recognizance of bail, and the *scire facias* roll containing the entry, "therefore it is considered that the plaintiffs have their execution thereupon against the bail," for this is an award or judgment of execution, and not a judgment to recover (u).

An allegation of a writ indorsed to levy 600*l.*, together with sheriffs' poundage, officers' fees, and other legal charges and incidental expenses attending the levy, is not (it has been held) proved by a writ indorsed to levy 600*l.* together with sheriffs' poundage, officers' fees, &c. (x).

An averment that a *clausum fregit* issued out of the Common Pleas with a *prout patet*, is not proved by the record of an appearance to a *clausum fregit* issued out of Chancery (y).

A bill of exchange alleged to have been drawn at Dublin, to wit, at Westminster, for a specified sum of money, is not proved by evidence of a bill of exchange drawn in Ireland for that sum of money; for English currency differs from Irish, and the bill declared upon must be taken to be a bill drawn in England for English money (z).

An averment of an order for the landing of goods on a quay or wharf, is not satisfied by proof of an order to deliver at the king's warehouse, although the warehouse stands upon the quay (a).

An omission to allege that which has no legal operation is immaterial (b); as, if a bill of exchange be alleged to be drawn for the payment of so much money, and the bill proved to be for the payment of so much money sterling (c).

But a variance in alleging the substance and effect of a deed or

of the covenant. Ibid. And *Elliott v. Blake*, 1 Lev. 88. *Gordon v. Gordon*, 1 Starkie's C. 94; Com. Dig. *Pleader*, C. 97.

(t) *Gery v. Wheatley*, 1 H. B. 163.

(u) *Phillipson v. Mangles*, 11 East, 516.

(x) *Stiles v. Rawlins*, 5 Esp. C. 133.

(y) *Myers v. Kent*, 2 N. R. 563.

(z) *Kearney v. King*, 2 B. & A. 301.

(a) *R. v. Cassano*, 5 Esp. C. 231.

(b) *Sanderson v. Judge*, 2 H. B. 509.

(c) *Kearney v. King*, 2 B. & A. 301. *Glossop v. Jacob*, 1 Starkie's C. 69. So where a memorandum is made on a bill of exchange, or promissory note, which is no part of the bill or note. See *Hardy v. Woodroffe*, 2 Starkie's C. 310. *Butterworth v. Lord Le Despencer*, 3 M. & S. 150.

Written
instrument.
Variance
from legal
effect.

other instrument will be fatal, although the allegation be not material to the cause of action.

The plaintiff declared in covenant that the defendant demised to him a wharf and *storehouses*, where the word in the deed was *storehouse*, in the singular, and it was held to be a fatal variance, although no breach was assigned on the demise of the storehouse (*d*).

So where the declaration in an action on the case against the sheriff, alleged a judgment for non-performance of promises, and the judgment proved was for non-performance of a single promise (*e*).

In the previous case of *Hamborough v. Wilkie* (*f*), where the plaintiff, in declaring on a mortgage-deed, alleged that the defendant bound himself, his *heirs*, executors, and administrators, and on *non est factum* pleaded, it appeared that the word *heirs* was not in the deed, it was held that the variance was not fatal, inasmuch as the allegation of heirs was purely impertinent, and might have been struck out upon motion. It is difficult, however, to rescue this case from the operation of the rule so often adverted to, that a descriptive averment, though ever so immaterial, is never impertinent. And the authority of this case seems to have been much doubted in the later case of *Hoar v. Mill* (*g*).

Writing
vouched by
date, &c.

Thirdly, Where an instrument is not alleged by its tenor, but is vouched and referred to by its date, or names, sums, days of payment, or other particulars, a variance from the precise allegations will be material, for they are descriptive of the instrument itself (*h*). First, if it be described by the date (*i*):

Where a judgment was described as in a suit during the reign of the present king, it was held that it was not supported by evidence of a judgment in a preceding reign (*k*).

(*d*) *Hoar v. Mill*, 4 M. & S. 470.

(*e*) *Edwards v. Lucas*, 5 B. & C. 539.

(*f*) 4 M. & S. 474, n.

(*g*) 4 M. & S. 470. See the observations of Lord Ellenborough, C. J., and Le Blanc, J., *ibid*.

(*h*) See in general *Green v. Rennett*, 1 T. R. 658. *Purcell v. Macnamara*, 9 East, 157. *Edwards v. Lucas*, 5 B. & C. 339. *Sheldon v. Whitaker*, 1 R. & M. 266. *R. v. Bellamy*, 1 R. & M. 171. *Brown v. Jacobs*, 2 Esp. C. 726. *R. v. Taylor*, 1 Camp. 294. *Woodford v. Ash-*

ley, 2 Camp. 193; and the cases cited below.

(*i*) *Baynham v. Matthews*, Fitzg. 130. *Stafford v. Farrer*, cited Str. 22. A lease to commence *from* the day of the date, may mean either *exclusively* or *inclusively*. *Pugh v. Duke of Leeds*, Cowp. 714; see *Welsh v. Fisher*, 2 Moore, 378. An Act passed in the 24th year, &c. when the Parliament was continued by prorogation till the 25th year, &c., being described in a conviction as passed in the latter year, the variance was held to be immaterial. *R. v. Windsor*, 2 Ch. C. T. M. 513.

(*k*) *Dickins v. Grenville*, Carth. 158. ●

So if in debt on a judgment of Hilary term, on *nul tiel* record pleaded, it appear to be a judgment of Easter term (*l*). Writing vouched by date, &c.

So if a declaration on a note payable by instalments mis-state the day on which one of the instalments is payable (*m*).

But if the date alleged be merely formal, as if it be prefaced by a *videlicet*, and therefore be not descriptive, it may be proved to have been made on another day, and the variance will not be fatal (*n*).

An allegation of date, according both to the legal and dominical year, is supported by evidence of a deed 30th March 1701 (*o*).

An admission of the due execution of the deed stated in the declaration, does not preclude the defendant from objecting on the score of variance (*p*).

So a variance from the *place* at which a deed is dated, is also material (*q*).

Where the time of a particular fact is not material, a variance from the date will not be material, although it is to be proved by a record or other written instrument, provided the time be not alleged as descriptive of the record, by means of a *prout patet per recordum*, or otherwise; and therefore, where in an action for a malicious prosecution the plaintiff alleged that he was acquitted on a particular day (*r*), it was held, that the precise day was not material, the substance of the allegation being, that the plaintiff was acquitted before the commencement of the action (*s*). So where in an action on the case for not indemnifying the plaintiff, he alleged that *B.* afterwards, to wit, in Michaelmas term in such a year, obtained judgment against him, and on the trial it appeared that the judgment was of a different term, it was held that

(*l*) *Wells v. Girling*, 3 Moore, 75.

(*m*) *Ince v. Hay*, Fort. 35.

(*n*) *Wells v. Girling*, 3 Moore, 75. *Nicholls v. Bamfylde*, 1 T. R. 657. And see Hob. 209; 3 Lev. 243. *Phillips v. Shaw*, 4 B. & A. 435; *infra*, note (*t*). And if the description merely state that a promissory note was made on such a day, though it bear date on a different day, the variance will not be fatal. *Coxon v. Lyon*, 2 Camp. 308, n. *Pasmore v. North*, 13 East, 517.

(*o*) *Holman v. Burrough*, Salk. 658, 9.

(*p*) *Goldie v. Shuttleworth*, 1 Camp. 70. But *semble*, it would have been otherwise if the admission had run "as stated in the declaration." *Ibid*.

(*q*) B. N. P. 170; Salk. 659. Debt on bond *quod cum defendens apud London, &c. concessit se teneri*, on oyer it appeared that the deed was dated at Port St. David's, and the Court held that the dating was local, although the plaintiff might have averred London by way of *venue* merely under a *videlicet*. But *qu*. whether, if the place be not expressly averred as descriptive of the record, as by the words "bearing date at such a place," the averment of place would not be ascribed to *venue*.

(*r*) *Purcell v. Macnamara*, 9 East, 157.

(*s*) *Ib.* and 9 East, 660; and see *R. v. Payne*, *there cited*; and *Brinley v. Watson*, 2 Bl. R. 1050.

Writing
vouched by
date, &c.

the variance was not material (*t*), the time not being alleged with a *prout patet per recordum*. It has been since held that a *prout patet* alleged unnecessarily, and which might have been struck out of the declaration, may be rejected as surplusage (*u*).

It is otherwise where the date is material from the nature of the case. The plaintiff, in an action against an attorney, for not proceeding to judgment in due time, alleged under a *videlicet*, that process was sued out Jan. 24, 1785, returnable on Monday next after fifteen days of St. Hilary. He proved process sued out 24th Jan. 1784; and it was held to be material, because it affected the time of the return, and consequently the time when the defendant ought to have proceeded to judgment (*x*).

By name.

In debt on a judgment, a variance as to the name of any party, his abode or addition, will be fatal on *nul tiel* record pleaded (*y*).

Where the plaintiff declared in debt on a judgment against *Hamilton Fleming*, esquire, and on *nul tiel* record pleaded produced a judgment against the right honourable *Hamilton Fleming*, Earl of *Wigton*, having privilege of peerage, the variance was held to be fatal (*z*).

The plaintiffs being assignees of *B. Tabart*, sued as such on a recognizance of bail, the defendants pleaded *comperuerunt ad diem*, and on the production of the roll it appeared that bail had been put in at the suit of the plaintiffs, as the assignees of *B. Tarbart*, and the defendants had judgment (*a*). So an allegation that a commission of bankrupt issued against the surviving partner of *Edmund Darby*, is not proved by evidence of a writ to supersede a commission against *Edward Darby* (*b*), although the plaintiffs were in fact surviving partners of *Edmund Darby*.

(*t*) *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984. *Gadd v. Bennett*, 5 Price, 549; *infra*, 492. *Rastall v. Stratton*, 1 H. B. 49.

(*u*) *Stoddart v. Palmer*, 3 B. & C. 2, P. C. The distinction is between matter of substance, which must be substantially proved, and matter of description, which must be literally proved: the *prout patet* was unnecessary, and therefore may be rejected as surplusage. 1b. Co. Litt. 303, a. *Watte v. Briggs*, 1 Ld. Raym. 35; 3 Salk. 565.

(*x*) *Green v. Rennett*, 1 T. R. 350. And see *Few v. Backhouse*, 8 Ad. & Ell. 789.

(*y*) 1 Roll. 754, l. 40.

(*z*) *Blackmore v. Fleming*, 7 T. R. 447. Where, on a *sci. fa.* on a judgment, a

judgment was alleged to be a judgment for damages by reason of the non-performance of a certain promise and undertaking, and the judgment itself was for the non-performance of certain promises and undertakings, the variance was held to be fatal. *Baynes v. Forrest*, Str. 892. But it seems that the case was adjourned. 1 Ford, 38. See *Black v. Lord Braybrooke*, 2 Starkie's C. 7. *Supra*, 485, 6. But an averment that issue was joined, was held to be proved by an information containing two counts on each of which issue was joined. *R. v. Jones*, Peake's C. 38.

(*a*) *Bingham & others v. Dickie*, 5 Taunt. 814, ●

(*b*) *Matthews & another v. Dickinson*, 7 Taunt. 300.

In an action against a surety on a bail-bond, an averment of the issuing a *latitat* against *Francis J.* by the name of *John J.*, is not supported by proof of a *latitat* against *John J.*, although the bond was signed by the principal in this form, "*Francis J.* arrested by the name of *John J.*" (c). But it seems that a mere variance from the omission in the declaration of the description which is superadded in the record, is not material unless some ambiguity result (d). The declaration styled a party in a former cause *Samuel Glover*, but the record in reciting the judgment against *Glover* styled him *Samuel Glover* the younger, and the objection was overruled; for although the declaration did not give the party his full description, yet it did not give him a wrong description (e).

Where an indictment alleged that an action was depending between *A.* and *B.*, and the judgment produced began "*B.* sued by the name of *C.* was summoned," &c. it was held that the omission of the name by which *B.* was miscalled in the process was immaterial (f). So it seems in general that if the name of the party be not alleged as descriptive of the record, and be truly alleged, a variance from it on reading the record will not be material (g).

So a variance as to the number of parties (h) or parcels described (i), or damages (k), will be fatal. Thus a variance in setting out a covenant of a lease, in alleging the *Cellar-beer* field for the *Allerbeer* field, is fatal, although the plaintiff offer to waive damages on that breach (l).

Where the declaration on a deed of covenant recited certain premises to be late in the occupation of *Samuel R.*, and in the lease it stood *Saul R.*, the variance was held to be fatal (m).

If a judgment for an entire sum be stated, a variance will be

(c) *Scandover v. Warne*, 2 Camp. 270.

(d) *Aney v. Long*, 1 Camp. 14.

(e) 1 Camp. C. 14. So where the declaration described a writ as against *M. B.*, and the writ produced was against *M. B. spinster*. *Brown v. Jacobs*, 2 Esp. C. 726. *Secus*, as to the converse. *Ib.*

(f) *R. v. Windus*, 1 Camp. 406. An indictment for perjury, setting out the record of the case at the trial at which the perjury was alleged to be committed, stated an adjournment of the sessions by — Const, esq., and *B. C. D.* and others, their fellows, justices, &c., the record

stated it to have been made by — Const, esq., and *E. F. G.*, and others, their fellows, &c. Lord Tenterden is reported to have held that evidence was admissible to show that the justices named in the indictment were present. *R. v. Bellamy*, 1 R. & M. 174.

(g) *Vide supra*, 479.

(h) 1 Rol. 753, l. 45. *Rastall v. Stratton*, 1 H. B. 49.

(i) 3 Co. 2, a.

(k) 1 Rol. 754, l. 40.

(l) *Pitt v. Green*, 9 East, 188.

(m) *Bowditch v. Mawley*, 1 Camp. 195. See *Pitt v. Green*, 9 East, 188.

Sums. material; but if the judgment be for several distinct sums, an allegation that the judgment was given for one or more of those sums, according to the fact, without noticing the rest, will be good (*n*).

Estoppel. A variance is immaterial where the defendant is precluded from taking advantage of it by estoppel; as where he has executed a deed by a name which is not his own (*o*), or by any act of his which operates in the nature of an estoppel. Thus a lessee or assignee of a lessee is estopped from disputing the title of his lessors (*p*). And therefore, where the plaintiffs, who derived title from two of four lessors, the two other lessors having no interest in the premises, alleged a demise by the four, and also alleged that two of the four had no title, the objection being taken that the plaintiffs should have alleged a demise by the two who had title, it was held that the defendant was estopped by the lease (*q*).

An allegation, in an action against the acceptor, that the bill was drawn by certain persons trading under the name and firm of *A. B. & Co.*, is satisfied by proof of a bill accepted by the defendant, and purporting to have been drawn by *A. B. & Co.*, although it be proved that the firm consists of but one person (*r*); for the defendant is precluded from taking the objection by his acceptance.

But on an indictment for stealing a note signed by *A. Hooper*, when it was not so signed, the variance is fatal (*s*).

A lease was described to be made by the plaintiff of the first part, *James Cooke* of the second, and *J. S.* of the third, and the parties were so described in the heading of the lease, but *Cooke* was in other parts of the lease described as *George Cooke*, and it was uncertain, on the face of the deed itself, whether his name was *James* or *George*, but it purported to be executed by *George Cooke*; the variance was held to be fatal on *non est factum* pleaded (*t*).

Where the writing is used as mere evidence.

4thly. Where a fact is simply alleged, without vouching any instrument, and the instrument is used as mere evidence, a vari-

(*n*) *Phillips v. Bamer*, 5 Esp. C. 358; where judgment was given on a *scire facias* for the debt and costs in the original action, also for the nonprossing of a writ of error brought on that action, and for the damages and costs in the *scire facias*; and the declaration against the sheriff for a false return stated the first two sums only.

(*o*) *Gould v. Barnes*, 3 Taunt. 104.

(*p*) *Atkinson v. Coatsworth*, 1 Str. 512.

And per Gibbs, C. J. in *Wood v. Day*, 1 Moore, 399.

(*q*) *Wood v. Day*, 1 Moore, 399.

(*r*) *Bass v. Clive*, 4 M. & S. 13.

(*s*) *R. v. Craven*, Russ. & Ry. C. C. L. 11.

(*t*) *Maydston v. Lord Palmerston*, 1 Mo. & M. 6.

ance will not be fatal, if the substance of the allegation be proved.

Where the writing is used as mere evidence.

An allegation that a *latitat* was issued on the 21st of June, is proved by evidence of the issuing of a *latitat* then, though tested of the previous term (x).

A declaration for not indemnifying the plaintiff alleged that D. P. afterwards, to wit, in Michaelmas term, 58 G. 3, recovered and obtained judgment against the plaintiff, and the record produced was of *Hilary* term; the variance was held to be immaterial, the time not being alleged as descriptive of the instrument by means of a *prout patet* (x).

An allegation that rent is due in respect of a certain messuage, dwelling-house and premises, is supported by evidence of a lease of two messuages, for *premises* may be considered as a cumulative description (y).

An allegation in an action on the case for a conspiracy to indict for barrettry, alleged it to be *coram justiciariis de pace necnon ad diversas felonias, &c.*, and the indictment proved was before justices of the peace, without more, it was held to be no variance, for as justices of the peace they might take the indictment (z).

Where the declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence, and it appeared that the charge was made for assaulting and striking, and the warrant produced recited the charge to be for assaulting and beating, it was held that the variance was not material (a).

But if a party unnecessarily allege that to have been effected by means of a judgment on record which might have been alleged generally, and proved by other means, he will be bound to prove it by a judgment of record (b).

The plaintiff alleged that the defendant permitted his bill to

(u) *Anon.* 1 Vent. 362. But where, in an action against the sheriff for removing goods without paying a year's rent, the declaration alleged a *feri facias* from the Court of King's Bench, and the *fi. fa.* produced was from C. B., the variance was held to be fatal. *Sheldon v. Whitaker*, 4 B. & C. 657.

(x) *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984; *supra*, 488.

(y) *Taylor v. Broake*, 2 M. & S. 269. An averment, that in consideration that the defendants had become tenants to the plaintiff of certain premises, they under-

took to keep the same in good and tenantable repair, is proved by an agreement containing a variety of provisions, and amongst others, that the defendants would make good all repairs within three months after notice by the plaintiff of the want of repairs; for the obligation to repair arises out of the tenancy, and the agreement was evidence to prove the promise as laid. *Colley v. Stretton*, 2 B. & C. 273.

(z) Cro. Jac. 32; Yel. 40.

(a) *Byne v. Moore*, 5 Taunt. 187.

(b) 5 Price, 540.

Where the writing is used as mere evidence.

be discontinued for want of prosecution thereof, and that thereupon it was then and there considered by the said Court that the said defendant should take nothing by his said bill *prout patet*, &c. whereby the said suit then and there became and was wholly ended and determined; it was held that this was not proved by the production of the rule to discontinue, although had the allegation been general it would have been satisfied by the production of the rule and payment of costs (b).

Description of judgments. Process, &c.

The averment of a judgment with a *prout patet per recordum* does not render proof by a record necessary, where, from the nature of the judgment, as averred, it appears that it is not of record, as where the plaintiff declares in debt on a judgment in Jamaica (c).

Description of courts. Process, &c.

Where it is necessary to allege a court having judicial authority, it is not essential that the style set out in the record should be exactly copied (d).

Where a declaration in an action for a malicious prosecution alleged that the defendant caused the plaintiff to be indicted at the general quarter sessions of the peace for Middlesex, and the record stated the indictment to have been found at the general sessions, it was held to be sufficient, the offence being cognizable at such general sessions (e).

A conviction being alleged to have been quashed at the general quarter sessions, &c. the allegation is supported by proof that it was quashed at an adjournment (f).

Action.

In an action for not indemnifying the sheriff, against whom trover had been brought for levying under a *fi. fa.*, after an act of bankruptcy, an allegation that an action was prosecuted for the recovery of *the said money* was held to be sufficient (g).

A bill of Middlesex is well described as a precept of the king (h).

An allegation that an action is depending in his Majesty's Court of the Bench at Westminster is not supported by proof of a pluries bill of Middlesex, for by such an allegation the Court of Common Pleas must be intended (i).

(b) *Gadd v. Bennett*, 5 Price, 540. It was also held that a variance from the sum in the *ac etiam* part of a writ was fatal; vide *supra*, 480, 1.

(c) *Walker v. Witter*, Doug. 1. And see *Wigley v. Jones*, 5 East; but see *Turner v. Eyles*, 3 B. & P. 456.

(d) *Constantine v. Barnes*, Cro. Jac. 32. *Busby v. Watson*, 2 Bl. 1050.

(e) *Busby v. Watson*, 2 Bl. 1050. *Secus*, if the general sessions had not had authority. *Ib.*

(f) *Simpkin v. French*, 12 Price, 394. *Hullock, B., dub.* See tit. LIBEL.

(g) *Batchelor & another v. Salmon*, 2 Camp. C. 525.

(h) *Harris v. Bernard*, Str. 1060.

(i) *Impey v. Taylor*, 3 M. & S. 166.

An averment that a defendant was acquitted by a jury in the Court of our said Lord the King, before the King himself, is a description of an acquittal on a trial at bar, and is not proved by an acquittal at *Nisi Prius* (*k*). Action.

A commission of bankrupt, though under the great seal, does not issue out of Chancery; and it seems that an averment that it did so would be fatal (*l*).

Under penal statutes, allegations of the receipt or embezzling of money are not satisfied by evidence of the receiving or embezzling bank-notes or bills of exchange, or other equivalent for money (*m*). Money.

An averment that *A.* has received 500*l.* is not satisfied by evidence that stock to that amount has been transferred into his name (*n*).

An allegation of a loan of lawful money of Great Britain is supported by evidence of a loan of foreign money, as pagodas (*o*).

In the ordinary description of articles of trade, or other subject-matter of averment, a variance will be material, or otherwise, in point of law, as it is material or immaterial in point of fact in ordinary language and acceptation. If the agreement alleged be to deliver merchandisable corn, proof of an agreement to deliver good corn of the second sort is insufficient (*p*). Description of things.

Where the defendant in an action on a bond pleaded that the bond was given to receive money won by the plaintiff from the

But where taking the whole record together it sufficiently appeared that the condition of the bond was for appearance in the Court of C. P., it was held that it was no variance from the statement of the condition in the declaration to appear "before the Justices of our said Lord the King at Westminster," according to the exigency of the writ. *Crofts v. Stockley*, 5 Bing. 32; 1 M. & P. 81; 3 C. & P. 281. Where the declaration against the sheriff for an escape, alleged that the party was taken under a certain writ "*of the King*," called a *ca. sa.*, issued on 8th May 1826, but the writ produced was in the name of Geo. 3, but tested Sir W. D. Best, Knt., 8th May, in the *seventh* year, &c., indorsed "May 13th, 1826;" held that the variance was immaterial, and that the sheriff having acted under the writ, could not afterwards treat it as a nullity. *Elvin v. Drummond*, 12 Moore, 523. And see

Renalds v. Smith, 2 Marsh, 258; 6 Taunt. 251.

(*k*) *Woodford v. Ashley*, 11 East, 599; 2 Camp. 193. See *R. v. Coppard*, 1 Mood. and M. C. 118.

(*l*) *Poynton v. Foster & others*, 3 Camp. 58.

(*m*) Vol. II. tit. LARCINY.—EMBEZZLEMENT.—Where a clerk was charged with having received a 50*l.* bank-note, and 14*s.* 10*d.* in money, and having embezzled the money, but the party who paid it could not state how he paid it, whether all in notes, or by a draft, Bailey, J., directed an acquittal (*R. v. Iles*, Surrey Spring Assiz. 1816; Mann. Ind. 372), and said that it ought to have been proved that the defendant received the 14*s.* 10*d.* in monies numbered.

(*n*) *Jones v. Brindley*, 5 Esp. C. 205.

(*o*) *Harrington v. Macmorris*, 5 Taunt. 228.

(*p*) B. N. P. 145; 1 Ray. 735.

defendant at a game called *Faro*, it was held to be necessary to prove the money to have been lost at that particular game (*q*).

Reconcile-
ment of
variance by
averment.

It will be seen, that where a written instrument, such as a record, is vouched in proof of an allegation, parol evidence is in many instances admissible to reconcile the allegations with the instrument (*r*). But where a variance occurs, which without extrinsic explanation would be fatal, it seems that an averment of identity is usually necessary to warrant such evidence.

The defendant in ejectment for the manor of Artam pleaded ancient demesne, and when Domesday Book was brought into court, offered to prove that the manor was anciently called Nettam, but the evidence was rejected, for the variance ought to have been averred on the record (*s*).

It is a rule, that where a general allegation is put in issue, particular instances may be shown to prove it (*t*). It is otherwise in the case of barrettry ; for there, although the indictment be general, notice must be given of the particular acts intended to be proved. So also where the general question arises collaterally, for then the party cannot be prepared to answer them.

Where in assumpsit the record of *Nisi Prius*, which corresponded with the agreement, varied from the declaration and issue delivered, and a verdict had been found for the plaintiff, the Court refused to set it aside, as the Judge might at the trial have amended the variance (*u*).

Two statutes are now to be adverted to, the objects of which are enumerated in their preambles. The statute 9 Geo. 4, c. 15, entitled, "An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof," recites, that "Whereas great expense is often incurred and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," and then enacts, "That it

(*q*) *Mazzinghi v. Stephenson*, 1 Camp. 291. See *Calborne v. Stockdale*, Str. 493. *Sigell v. Jebb*, 3 Starkie's C. 1.

(*r*) Vol. II. tit. PAROL EVIDENCE ; Crim. Pleading, 325. 329, 2d edit.

(*s*) *Gregory v. Withers*, 28 C. 2 ; Gilb. Ev. 44 ; 3 Keb. 588.

(*t*) Per Lord Hard. 2 Atk. 339. 346. As on an indictment for keeping a house

of ill fame, or issue on *non compos*. In *Clarke v. Periam*, 2 Atk. 333, a bill was filed to compel a woman to give up a bond given as *premium pudicitie*, charging her with previous lewd conduct ; and per Lord Hardwicke, C., general lewdness being charged, particular instances may be proved, for putting it in issue is sufficient notice.

(*u*) *Berney v. Greenc*, 12 Moore, 174.

shall and may be lawful for every court of record holding plea in civil actions, any Judge sitting at *Nisi Prius*, and any Court of Oyer and Terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit (x) so to do, to cause the record on which any trial may be pending before such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance (y) shall appear between any matter in writing or in print produced in evidence (z), and the recital or setting forth thereof upon the record (a) whereon the trial is pending to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party as such Judge or Court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned, together with the record, and thereupon the

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ment of
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(x) Lord Tenterden refused to amend the declaration, where the variance arose from want of due care in drawing it. *Jelf v. Orvil*, 4 C. & P. 22. It has been held that the Judge's discretion in making an amendment under this statute cannot be reviewed. *Parke v. Edge*, 1 Cr. & M. 429. In *Prudhomme v. Fraser*, 1 Mood. & R. 435, Lord Denman refused to strike out superfluous innuendos in a declaration for libel.

(y) These words have been held to extend to the amendment of a misdescription of a promissory note as a bill of exchange. *Moillet v. Powell*, 6 C. & P. 233. A mistake in the date of a bill of exchange, 1 Cr. & M. 429. *Bentzing v. Scott*, 4 C. & P. 24. A mis-statement of the Court in getting forth the record of a judgment. *Briant v. Eicke*, M. & M. 359. A declaration for not obeying a subpoena stated that the plaintiff caused to be left with the defendant a copy of the writ of subpoena. The writ was in fact directed to the defendant and two others, but the copy served was directed to him and *John Doe*, and it was held that the Judge might direct the declaration to be amended by alleging that the plaintiff caused to be left with the defendant a copy of so much of the said writ of subpoena as related to the

defendant. For the Court held that this was in substance an amendment to prevent a variance between the writing produced in evidence and the recital, or setting forth thereof upon the record, and not, as was objected, an allegation of a new fact. *Masterman v. Judson*, 8 Bing. 480.

(z) In the case of *Brookes v. Blanchard*, 1 C. & M. 779, the Court of Exchequer held, that the statute did not extend to a variance between a writing and secondary evidence of a writing.

(a) A writing is sufficiently set forth when it is described to be a copy of an original, of which it is not in fact a copy. *Masterman v. Judson*, 8 Bing. 480. And according to the case of *Lamey v. Bishop*, 4 B. & Ad. 479, the statute applies, and an amendment, according to a written contract proved, is admissible, although the declaration merely sets forth a contract without professing to set forth a written contract. The Court, in this case, relied on *Masterman v. Judson*, and seem to have overruled a previous *Nisi Prius* decision, in which Parke, J. held that a variance between the terms of a tenancy as stated in an avowry, and a writing adduced in support of it was not amendable. *Ryder v. Mallone*, 3 C. & P. 595.

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papers, rolls, and other records of the Court from which such record issued shall be amended accordingly."

The stat. 3 & 4 W. 4, c. 42 (b), recites, that "Whereas great expense is often incurred and delay or failure of justice takes place at trials by reason of *variances* as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: and whereas it is expedient to allow such amendments as are hereinafter mentioned to be made in the cause," and *therefore enacts*, "that it shall be lawful for any court of record holding plea in civil actions, and any Judge sitting at *Nisi Prius*, if such Court or Judge shall see fit so to do (c), to cause the record, writ or document, on which any trial may be pending before any such Court or Judge in any civil action, or in any information in the nature of a *quo warranto* or proceedings on a mandamus, when any variance shall appear between the *proof* and the *recital* (d) or setting forth on the record, writ, or document on which the trial is

(b) The new rules for pleading laid down by the Judges, by which a party is precluded from varying the statement of his case in a number of different counts, and is consequently more exposed to the danger of variance, unless either more general statements were permitted, or variances cured, or both, are founded on the assumption, that by the above Act, the powers at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged. See the observations of Parke, B. in *Handbury v. Ella*, 1 Ad. & Ell. 61; and see the observations of Alderson, B. in *Parry v. Fairhurst*, 2 Cr. M. & R. 196.

(c) Where the Judge at *Nisi Prius* had refused to amend the declaration in ejectment, where two tenants in common were alleged to have jointly demised, Lord Denman, C. J., intimated that the refusal could not be reviewed in Bank. But in *Doe v. Errington*, 1 Ad. & Ell. 750, the Judge

having refused to amend a count on a bill of exchange, the Court above granted a new trial, after a nonsuit on the ground of variance. *Pullen v. Seymour*, 5 Dowl. 164.

(d) The statute, it has been held, gives no authority to supply an omission, as by extending a justification of the taking of mirrors to the taking of handkerchiefs also, *John v. Currie*, 6 C. & P. 618; or to increase the damages laid in the declaration. *Watkins v. Morgan*, 6 C. & P. 661; or to strike out the name of a defendant, *Cooper v. Whitchurch*, 6 C. & P. 545; or to amend the award of process on the record, *Adams v. Power*, 7 C. & P. 76. In the case of *Pullen v. Seymour*, 5 Dowl. 164, the Judge at *Nisi Prius* refused to amend a count on a bill of exchange by inserting the words, "three months after the date hereof;" but the Court (of Exchequer) is reported to have set aside the nonsuit, and granted a new trial on payment of costs.

proceeding of any contract (e), custom, prescription, *name* (f), or other *matter* (g), in any particular or particulars in the judgment of such Court or Judge, *not material to the merits* (h) of the case, and Amend-
ment.

(e) A declaration is amendable by altering a contract to pay for goods delivered to a contract to guarantee payment. *Hanbury v. Ella*, 1 Ad. & Ell. 61. So, by altering a contract of general warranty of a horse to a warranty of sound, except in one foot, the breach complained of being unsoundness of wind, *Hemming v. Parey* 6 C. & P. 580. Alderson, B., in allowing the amendment, observed that if the defence had depended in any way upon the qualification of the warranty, he would not have allowed it, as that would have gone to the merits. So a declaration is amendable by substituting for an allegation that the defendant represented the horse to be sound, and a good worker, an allegation that he represented the horse to be sound in the wind. *Mash v. Denham*, 1 M. & R. 442. Alderson, B., in that case observed, that the variance was not material to the merits; it is presumable, therefore, although it is not so stated, that the defect proved was unsoundness of wind. So a declaration was amended by substituting for a contract by the defendant to deliver poles, to be paid for on delivery, a contract to pay cash on delivery with five per cent. discount. The defendant had pleaded *non assumptit*. Part of the poles had been delivered, but not paid for, and other part had been tendered, but rejected; and to the application to amend, it was objected that if the contract had been properly set out, the defendant would have pleaded that the plaintiff refused to pay on the first part delivery, and that thereupon the plaintiff rescinded the contract. Alderson, B., said that before he could allow the amendment, he must see that the defendant could not have been prejudiced by the mis-statement. It afterwards appeared that the plaintiff had refused to pay for the poles all the whole had been delivered; but there being nothing to show that the defendant had rescinded the contract, on that ground the amendment was allowed. *Ivey v. Young*, 1 M. & R. 546. In the case of *Parry v. Fairhurst*, 2 C. M. & R. 190, the declaration

was in case for negligence as carriers; plea not guilty; evidence that the defendants, if liable, were liable as wharfingers only. An application to amend was made after the defendants' case was closed, and the plaintiff's counsel was proceeding to reply; the learned judge refused to amend, but left the case to the jury, who found against the defendants as *wharfingers*. There were circumstances to show that the defendant might have been prejudiced in the conduct of his defence. The Court made the rule absolute for a new trial, on payment of costs, Parke, B., observing that he should, under the circumstances, have directed the amendment, postponing the trial to another day, to enable the defendants to prove in defence notice of limited liability.

(f) In *Doe v. Edwards*, 1 M. & R. 321. 6 C. & P. 208, Parke, B., amended the description of the parish, in an action of ejectment for a forfeiture. In *Howell v. Thomas*, 1 M. & R. 342, Coleridge, J., issue being joined in an action of trespass, as to the plaintiff's property in a close, described in the declaration as Clover-hill, allowed the name to be altered to Clover-moor.*

(g) A variance between the penalty of a bond, and that alleged, was amended. *Hill v. Street*, 2 C. & M. 420.

(h) In the case of *Doe v. Edwards*, 1 M. & R. 321, 6 C. & P. 208, where it was objected that an amendment as to the description of the parish ought not to be allowed, the action being a harsh and oppressive proceeding for a forfeiture. Parke, B., said, "I do not think that the supposed impropriety of the action is a consideration that ought to influence me in deciding whether I shall give leave to amend under the Act of Parliament." In *Doe v. Errington*, 1 Ad. & Ell. 750, the demise was joint by two lessors, who were in fact tenants in common. Taunton, J., refused an application to amend by striking out the name of one of the lessors, or adding proper words applicable to the title, saying that the amendment was prayed for on a point very material to the merits of the

Amend-
ment.

by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend on such terms as to payment of costs to the other party or postponing the trial, to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such Court or Judge, not material to the merits of the case, but such as that the opposite party *may have been prejudiced* (i) thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such Court or Judge shall think reasonable, and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned, together

case. In *Frankum v. The Earl of Falmouth*, 2 Ad. & Ell. 451, 6 C. & P. 529, the declaration alleged injury, by diverting a watercourse, the right to which the plaintiff claimed in respect of a mill. The right appeared in fact to be *ex jure nature*, and not in respect of the mill, which was of recent erection. Alderson, J., refused to amend, but directed the jury to find specially that the defendant had diverted the water from its proper course; but the Court above refused to give judgment for the plaintiff, deeming the variance to be material, and observing that the defendant might have prepared his defence to meet the claim made in respect of the mill, and not the land. In *Guest v. Elwes*, 5 Ad. & Ell. 118, in an action against the sheriff for an escape, the evidence was that he had negligently omitted to arrest, and the matter being specially found, the Court above gave judgment for the plaintiff, observing that the defendant had experienced no disadvantage from the course adopted,

and that, on the other hand, the plaintiff, who had suffered from some breach of duty on the part of the sheriff, and who most probably was without the means of discovering precisely what it was, might have been really injured by too strict an adherence to the issue actually joined. In the case of *Jenkins v. Treloar*, 1 M. & W. 16, upon a question, whether two counts, one of *assumpsit*, for a toll claimed as metage, and the second for toll claimed as a post duty, Parke, B., intimated that he would allow the one to be substituted for the other by way of amendment.

(i) In two cases of slander, (*Lejeune v. Dennett*, cor. Patteson, J., Winton Sp. Ass. 1835, and *Sheers v. Philp*, cor. Boland, B., Llanceest. Sp. Ass. 1836, Roscoe on Ev. 71), a material variance in the words was amended on the terms of the plaintiff's withdrawing the record, and paying the costs of the day, with liberty to the defendants to plead *de novo*.

with the record or writ, and thereupon such papers, rolls, or other records of the Court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had, provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued for a new trial upon that ground; and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet. And it is further enacted, that the said Court or Judge shall and may, if they or he think fit, in all cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said Court or the Court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.”

Amend-
ment.

In the next place, it is a rule that no evidence is necessary to prove that which is agreed upon by the pleadings; for the jury are sworn to try the matter in issue between the parties, and no other question is before them (*k*). If the defendant in replevin avow the taking the cattle damage-feasant in the *locus in quo*, as parcel of the manor of *K.*, and the plaintiff make title to the manor of *K.*, and traverse that the manor is the freehold of the defendant, the plaintiff cannot prove that *K.* is no manor, for that is admitted by the traverse (*l*). And the jury cannot find against the admissions of the parties on the record, though they be contrary to the truth; but in other cases, as has been seen (*m*), the jury are not estopped to find the truth, though the parties are. But where there are several issues joined, an admission involved in one does not operate as an admission in relation to any other (*n*).

Matters
admitted
by the
pleadings.

(*k*) B. N. P. 293; Bac. Ab. Ev. 602.

(*m*) *Supra*, 343; and see B. N. P. 293, *Goddard's Case*, 2 Co. 4 b.

(*l*) *Ibid.* and see tit. WAY.

(*n*) *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33; Willes, 380.

The best evidence must be adduced.

Next as to the *quality* of the evidence to be adduced by the parties.

It is the peculiar province of the jury to decide upon the force and effect of the evidence submitted to them ; but, as has already been seen, the law, by many rules of a negative nature, excludes from their consideration some matters, on account of their general tendency to mislead, and to create prejudice rather than to promote the cause of truth. One of the most important rules upon this subject is that which requires that the best *attainable* evidence shall be adduced to prove every disputed fact. This rule has already been adverted to, though but slightly, inasmuch as its effect is not to exclude any of the materials of evidence in the abstract, but only by comparison of the evidence offered with that which might have been produced, but which has been suspiciously withheld.

The ground of this rule (*o*) is a suspicion of fraud. If it appear from the very nature of the transaction that other and better evidence of the fact is withheld, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded, his object would be frustrated (*p*) : subject, then, to the observations which will be made upon the operation of this rule, it follows, that of the several gradations in the scale of evidence, no evidence of an inferior class can be substituted for that of a superior degree. It is a very general rule, that the contents of a writing cannot be proved by a copy (*q*), still less by mere oral evidence, if the writing itself be in existence and attainable (*r*). If a deed be lost, a copy is not evidence if a counterpart exist (*s*). And, except on special grounds, no declaration or entry by any person can be given in evidence, where the party who made such declaration or entry

(*o*) B. N. P. 293, 4 ; Gil. Ev. 13.

(*p*) Show. 397 ; Carth. 310 ; Holt, 284 ; Salk. 281 ; Bac. Abr. E. 662.

(*q*) *Supra*, 368. To prove an insurance from fire, the books of the company are not the best evidence. The policy itself must be produced. *R. v. Doran*, 1 Esp. C. 127. Kenyon, C. J., 1791.

(*r*) *Supra*, 308-9. See the observations of Lord Tenterden in the case of *Vincent v. Cole*, M. & M. 258, as to the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments. And see

also *The Queen's Case*, 2 B. & B. 287, *supra*. And see *Crowley v. Page*, 7 C. & P. 790. *Strother v. Barr*, 5 Bing. 151. Vol. II. tit. PAROL EVIDENCE—ASSUMPSIT—EJECTMENT—TITLE OF LANDLORD.

(*s*) *Supra*, 341. The commissioners under an inclosure Act having made minutes of their proceedings ; held, that parol evidence of the divisions and allotments was inadmissible, the minutes of the commissioners not being produced or accounted for. *Bendyshe v. Pearce*, 1 B. & B. 460.

can be produced and examined as a witness (*t*). These are well known definite gradations of evidence, to which the principles may be applied without much difficulty. Thus, upon a question, whether the abbey de Sentibus was an inferior abbey or not, Dugdale's *Monasticon Anglicanum* was refused, because the original records might be had at the Augmentation Office (*u*).

The best evidence must be adduced.

This rule relates not to the measure and quantity of evidence, but to its *quality* when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the fullest proof that every case may admit of. A will of lands may be proved by one witness only (*x*). If there be several eye-witnesses to a particular fact, it may be proved by the testimony of one only.

The rule is of a comparative nature.

Where the defendant, in order to disprove the right claimed by the plaintiff to erect certain hatches on a river, offered in evidence ancient articles of agreement between persons standing in the respective situations of the plaintiff and defendant; and the defendant's attorney produced the deed, and said he received it from the son of the owner of the defendant's land; and on the objection being taken that this was insufficient, the father was called, whose testimony was objected to on the score of interest; it was held that the deed was admissible, for the testimony of the father had been objected to, and the next best evidence had been given (*y*).

Nor does it apply in any case, unless the evidence proposed be in its general nature of an inferior degree to that for which it is

In what cases the rule applies.

(*t*) Even although the parties to be called would criminate themselves by the proof required. *Edmunstone v. Webb*, 3 Esp. C. 244. *The Queen's Case*, 2 B. & B. 311.

(*u*) Salk. 281. Oaths taken by a preacher under the Toleration Act are matter of record, and cannot be proved by parol evidence. *R. v. Hube & others*, Peake's C. 131. To prove that A. was chosen constable the wardmote book, containing an account of the election, should be produced; a list from the town clerk's office of the persons sworn in to serve the office, in which the name of B. appears as having been sworn as substitute for A., is not the best evidence. *Underhill v. Witts*, 3 Esp. C. 56.

(*x*) See tit. WILL. So in case of a deed, B. N. P. 264. So handwriting may be proved by another, without calling the

writer. See *Hughes's Case*, 2 East's P. C. 102. *McGuire's Case*, ib. For other illustrations, see *Leibman v. Pooley*, 1 Starkie's C. 167, and tit. AGENT—PERJURY. Where consent is to be negated, even in a criminal case, it is not absolutely necessary that the party himself whose negative is required to be proved should be called. As upon indictments for unlawfully killing deer or taking fish. *Allen's Case*, 1 Mood. C. C. 154, before the Judges. *Hary's Case*, 2 C. & P. 458. In the previous case of *R. v. Rogers*, 2 Camp. 654, Lawrence, J., is stated to have ruled that it was necessary to call the owner of the deer to negative consent, but in that case there seems to have been no evidence to negative consent.

(*y*) *Carol v. Jeans*, cor. Holroyd, J., *Dorch. Sp. Ass.* 1819, *Manning's Ind.* 375, 2d edit.

In what cases the rule applies.

sought to be substituted. It is not sufficient that it may probably be less satisfactory in the particular instance. Where a plaintiff proved notice to the defendant to produce a letter written by him to the defendant, it was held that the plaintiff was at liberty to prove the contents by any witness who knew them, and that he was not obliged to call the clerk who wrote the letter (z).

The rule does not exclude evidence when superior evidence fails.

The rule assumes, that from the nature of the transaction superior evidence may be had; and therefore it never excludes evidence which is the best that can be then produced by the party (a). Hence if a deed or other written document be lost, or be in the hands of the adversary, who refuses to produce it (b), a copy of it is admissible. If a witness to a bond, after his attestation becomes interested, it may be read upon proof of his handwriting (c); and so it may if he be dead, or be beyond seas, out of the jurisdiction of the court. So where the witnesses are dead, their depositions or their declarations made when they were *in extremis* frequently become evidence. Where a prisoner's examination, taken in writing before the coroner, could not, in consequence of an irregularity in the latter, be read, it was held that the coroner might be asked as to what the prisoner said on that occasion (d).

Or is unattainable.

Neither is the rule strictly adhered to where a mere negative is to be proved, especially where it results from inspecting documents of a voluminous nature (e). And though a witness cannot give evidence of accounts not produced, he may, it seems, be examined as to the general state of such accounts, or he may give evidence of the general course of trade, as that the practice has been to accept bills in a particular form, according to one invariable course of dealing (f). In *Rowe v. Brenton* (g), a witness was allowed to

(z) *Leibman v. Pooley*, 1 Starkie's C. 107.

(a) Gilb. Ev. 4, 5; B. N. P. 294.

(b) See WRITTEN INSTRUMENT, PROOF OR, *ante*, 398.

(c) *Godfrey v. Norris*, Str. 34; 3 Ves. 112. It is otherwise where the witness was interested at the time. *Swire v. Bell*, 5 T. R. 341. Where, on principles of public policy, a document cannot be read in evidence, the effect will be the same as if it was not in existence. *Cooke v. Maxwell*, 2 Starkie's C. 483. Therefore, where such a document contains an order from a public officer, no evidence can be given of its contents, but it may be shown that what was done, was done by the order of such officer. *Ibid*.

(d) *R. v. Reed*, 1 Mood. & M. C. 403.

(e) Where, in order to show the insolvent state of the party before bankruptcy, the assignees (plaintiffs) offered the ledger of the bankers of the bankrupt to prove that he had no funds in their hands, it was held, that they were properly received to prove the negative, without calling the different clerks who made the entries, although it might not be admissible to prove the affirmative. *Furness v. Cope*, 5 Bing. 114.

(f) *Roberts v. Doxon*, Peake's C. 83. But if the mode of dealing has varied, the bills must be produced. *Ibid*.

(g) 3 M. & R. 212.

state the result of his examination of a number of old records, and to prove their correspondence with one which had been read. So a witness may be examined as to a general balance of accounts (*h*), or as to the general result of inquiries from accounts rendered by a bankrupt of his affairs as to his solvency at a particular time (*i*). And in general, where evidence is given as to introductory or collateral matters, which do not depend at all upon the particular form or contents of the instrument, such evidence, though perhaps not strictly warranted, is for convenience sake usually admitted in practice without objection.

Does not exclude when superior evidence is unattainable.

Again, as the rule was intended to guard against fraud, its operation ceases where the presumption of fraud does not arise; consequently it does not apply where the law itself raises a presumption under particular circumstances. And therefore, in general, in order to prove that a particular person was a magistrate or constable, it is sufficient to prove that he acted as such; for then, in the absence of evidence to the contrary, it is to be presumed that he was duly and legally appointed (*k*). The rule extends to one acting as surrogate in the Ecclesiastical Court (*l*). Also to a public commissioner for taking affidavits (*m*). So where the plaintiff proved his acting as vestry clerk (*n*). So in the case of a revenue officer (*o*). The rule does not extend to a tithe collector acting under private authority (*p*). Nor to assignees of a bankrupt (*q*).

Or where no presumption of fraud arises from the substitution.

So where a document is of a public nature, a copy of it is evidence; for the production of the original is dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and consequently the absence of the original affords no presumption of fraud; and the probability of fraud is much diminished by the consideration that it would be liable to easy detection by reference to so accessible an original (*r*). For like reasons, inscriptions on tombstones, walls and fixed tables, are usually proved by oral evidence (*s*).

The rule does not apply where the adversary has admitted the fact which is to be proved; for he is in general barred by his own admission or representation, particularly if the other party has

Nor in case of an admission.

(*h*) *Roberts v. Doxon*, Peake's C. 83.

(*o*) See 26 Geo. 3, c. 77, s. 13, and *ib.*

(*i*) *Assignees of Mayer v. Sefton*, 2 Starkie's C. 274. Lord Kenyon had received similar evidence.

c. 82, s. 6.

(*p*) *Short v. Lee*, 2 J. & W. 468.

(*k*) *Spencer v. Billing*, 3 Camp. C. 310.

(*q*) *Passmore v. Bougfield*, 1 Starkie's C. 296.

(*l*) *R. v. Verelst*, 3 Camp. 432.

(*r*) *Infra*, Vol. II. tit. CHARACTER.

(*m*) *R. v. Howard*, 1 M. & R. 187.

(*s*) *Doe v. Cole*, 6 C. & P. 360. *R. v.*

(*n*) *M'Gulley v. Alston*, 2 M. & W. 211.

Fursey, 6 C. & P. 81.

Nor in case of an admission. acted on the faith of it, and no competition arises as to the comparative efficacy of two modes of proof (*t*).

But it has been held that an admission by an obligor of his execution of a bond does not supersede the necessity of proving it by calling the attesting witness (*u*).

A collateral writing does not exclude oral evidence.

So although it be a general and most inflexible rule, that oral evidence cannot be substituted for a written document, which by authority of law, or by private compact, is constituted the authentic and appropriate instrument of evidence, yet in other cases the mere existence of written evidence never excludes independent parol evidence to prove the same fact. Where a written instrument is required by law, or made by private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence (*x*); but in other cases its superiority is merely fortuitous and contingent, for it may be that the oral evidence is far more deserving of credit than the written evidence, and consequently the legal presumption of fraud does not exclude the oral evidence, however strongly it may tend to discredit it under particular circumstances (*y*). If several persons be witnesses of the same fact, and one of them to assist his memory, make a memorandum of it, this circumstance would not exclude the testimony of the other witnesses, who, from their number, their powers of discernment, and their concurrence in the same account, may be more entitled to credit than the witness who made the memorandum. If a prisoner confess his guilt before his examination is taken before a magistrate under the authority of the statutes, and the examination be not returned, or cannot be received in evidence, the prisoner's confession is admissible (*z*).

(*t*) See tit. ADMISSION, Vol. II., where the cases are collected.

(*u*) *Abbot v. Plumb*, Dougl. 205. See the ground of this rule, *supra*, 371. *

(*x*) See tit. ASSUMPSIT—EJECTMENT—PAROL EVIDENCE. Where in ejectment after notice to quit, it appeared by the plaintiff's evidence that the premises had been demised by a writing, it was held that he was bound to produce it. *Fenn v. Griffith*, 6 Bing. 533.

(*y*) See this subject more fully considered, Vol. II. tit. PAROL EVIDENCE.

(*z*) *R. v. Reason & Trunter*, 1 Str. 409. Where it appeared that a party was sworn

and examined before justices on a charge, held that it was to be presumed to have been taken down in writing, and that parol evidence of it was not receivable until the contrary was shown. *Phillips v. Wimburn*, 4 C. & P. 273. *A.* gives a warrant of attorney to secure a joint debt to *B.* and *C.*; *B.* receives the whole. In an action by *C.* to recover his moiety, *A.* may be called to prove the payment, without the production of the warrant of attorney. *Bayne v. Stone, executor of Stone*, 4 Esp. C. 13. For though the security was the foundation of the action, the immediate cause was the money paid to the defendant, which the debtor might

Where the contents of a writing have been read to the adverse party, and admitted by him to be true, oral evidence of the contents may be given, although the writing itself be inadmissible in evidence (a).

A collateral writing does not exclude oral evidence.

Where the plaintiff's agent entered into a verbal agreement with the defendant, and made a memorandum of the terms, to assist his own recollection, which was not signed by the parties, it was held to be unnecessary to produce it, for it was not the contract, but only a private note (b).

And in order to exclude oral evidence of a contract, it is necessary to prove that the contract was committed to writing. And therefore, after the plaintiff in ejectment had given parol evidence of the tenancy, the evidence was held to be sufficient, although it appeared upon the cross-examination of his witness that an agreement relative to the land in question had been produced upon a former trial between the same parties, and had been seen the same morning in the hands of the plaintiff's attorney (c).

Oral evidence of a contract, when excluded.

There is a distinction between the exclusion of evidence by the operation of this rule, and a mere failure or defect in evidence which is in itself admissible. The effect of the rule is to exclude particular evidence altogether until proof be given that better evidence is unattainable; and when such proof has been given, to admit the evidence of inferior degree. But evidence tending to the proof may be admissible, yet insufficient, and may still be so, although it be proved that better evidence cannot be had.

Distinction between secondary and defective evidence.

In the case of *Williams v. The East India Company* (d), the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan, which had been stowed on board the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evi-

prove to have been paid to the party sued without production of the security. Per *Ld. Kenyon*, ib. See *Ingram v. Lea*, 2 Camp. C. 521.

(a) *Jacob v. Lindsay*, 1 East, 460. And see *Doe d. Bingham v. Cartwright*, 3 B. & A. 320.

(b) *Dalison v. Stark*, 4 Esp. C. 163. *Ramsbottom v. Tunbridge*, 2 M. & S. 435.

(c) *Doe d. Wood v. Morris*, 12 East, 237. *Doe d. Shearwood v. Pearson*, ib. 238, in n. *Secus*, where it appears by the

plaintiff's evidence that there is a written agreement. *Fenn v. Griffith*, 6 Bing. 533. So where a memorandum of an intended agreement has been read over to an intended tenant, but has never been signed, parol evidence of the terms is admissible. *Doe d. Bingham v. Cartwright*, 3 B. & A. 326. See Vol. II. tit. STAMP.

(d) 3 East, 192. See the case of *Koster v. Reed*, 6 B. & C. 19; and Vol. II. tit. POLICY OF INSURANCE; PRESUMPTIVE EVIDENCE OF LOSS.

Distinction
between
secondary
and defective
evidence.

dence was given of what passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them of the nature of the roghan. It was objected, that the conductor of the stores ought to have been examined, and it was so ruled by Lord Ellenborough at Nisi Prius, and afterwards decided by the whole Court, on the ground, 1st, that the delivery without notice thus insisted upon by the plaintiff was a criminal act, and that therefore it was incumbent on the plaintiff to prove the neglect to give notice; and, 2dly, that the plaintiff had not given sufficient *primâ facie* evidence of the want of notice. The defect in this instance seems to have consisted rather in a failure in the measure of the proof, than in the substitution of secondary for original evidence. It was necessary to negative the fact of communication, which, under the circumstances, could be proved by no one but the conductor, for the chief mate was dead; and that evidence which was essential was not given. The evidence which was received of the captain and second mate, that they did not know that any communication had been made of the nature of the article, was not evidence of a secondary nature, substituted in the place of superior evidence, for it was at all events admissible evidence, and would still have been admissible had the conductor been called, contrary to the nature of secondary evidence, which can never be admitted where the superior evidence is adduced, but is wholly superseded by it. Neither, like secondary evidence, could it have been substituted for the superior evidence, when the latter had become unattainable; for had the conductor been dead, there would still, it seems, have been a defect in the evidence incapable of being supplied by that of the captain and chief mate.

Quantity
and measure
of
evidence.

With regard to the *quantity* and *measure* of proof, but few observations are requisite. It is for the parties, according to their own discretion, to procure such evidence as the circumstances of the case may supply; and it is for the jury to decide upon its effect. The law rarely interferes as to the measure of proof; and the sufficiency cannot, in the nature of things, be subject to legal definition or control (e). All that can be done is to intercept such evidence as would tend to prejudice or mislead; the law then confides in the good sense and integrity of the jury. In some few instances, however, the law interferes as to the *number* of witnesses (f).

(e) Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest.

(f) It seems that in equity no decree can be made on the oath of one witness against the defendant's answer on oath.

As in the case of high treason, when it works corruption of blood; there two witnesses are necessary by the express provision of the statute law (*g*). So in the case of perjury, two witnesses are essential, for otherwise there would be nothing more than the oath of one man against that of another (*h*), upon which the jury could not safely convict.

Quantity and measure of evidence.

In other cases the general rule seems to be, that where there is any legal admissible evidence tending to prove the issue, the effect of that evidence is solely for the consideration of the jury (*i*).

It is, however, in all cases requisite that the plaintiff should adduce some *prima facie* evidence in support of every essential allegation. Where there is a failure of evidence, tending to establish any one essential averment, the Court directs an acquittal in a criminal, or directs the plaintiff to be ~~re~~consuited in a civil case. But, in civil actions, if there be any evidence, however weak, tending to the proof of the issue, the plaintiff may, by appearing when he is called, have his case submitted to the consideration of the jury; but if there should be no evidence tending to prove any one essential fact, the jury would be directed to give a verdict against him, by which he would be absolutely and finally concluded.

No evidence is requisite to prove the existence of a fact which must have happened according to the constant and invariable course of nature (*k*), or to prove any general law (*l*), nor is it neces-

Matters judicially noticed.

Vent. 161; 3 Ch. C. 123. 69. And one witness is not sufficient against the husband, although it be supported by the answer of the wife, for she cannot be a witness against her husband. 2 Ch. C. 30; 3 P. Wms. 238. But a decree may be made on the evidence of a single witness where the evidence of the party is falsified. 2 Vern. 554; 2 Atk. 19; 3 Atk. 419; 1 Bro. Ch. C. 52.

In general, at common law, one witness was in all cases sufficient; per Holt, C. J., who said that the authorities cited by Lord Coke to the contrary did not warrant his opinion. Carth. 144; Co. Litt. 6 a. The Spiritual Court, acting upon the rules of the civil law, requires two witnesses; but where temporal matter is pleaded in bar of an ecclesiastical demand, and the evidence of one witness is refused, a prohibition will be awarded. As where an executor proves the payment of a legacy

by one witness. Show. 151; 3 Mod. 172. 283; Comb. 160; Holt, 752; Ld. Raym. 22; Ven. 291; Carth. 142.

(*g*) 7 W. 3, c. 3; 1 Ed. 6, c. 12; 5 & 6 Ed. 6, c. 12. *Qu.* whether the stat. 1 & 2 P. & M. c. 10, repealed the stat. 1 Ed. 6, c. 12, 5 & 6 Ed. 6, c. 11, as to the necessity for two witnesses in the case of petit treason. According to Forster, 337, petit treason stands on the stat. 5 & 6 Ed. 6, and therefore two witnesses are necessary. But now see the stat. 9 Geo. 4, c. 31, s. 2.

(*h*) Vol. II. tit. PERJURY.

(*i*) *Infra*, Vol. II. tit. CONVICTION.

(*k*) See Lord Ellenborough's observations, 8 East, 202.

(*l*) Facile patet non indigere probatione jus commune, quod iudici jam notum esse censetur. Heinecc. El. J. C. 443. The Courts notice the contents of all public Acts. *Renier v. Fagosa*, Plow. 12; 1b.

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sary to prove any general customs of the realm (*m*), or any artificial

81, a, 83, b; Bro. Ab. Cro. pl. 40. Such as relate to trade in general. *Kirk v. Nowell*, 1 T. R. 118; *secus*, where a statute relates to a private trade only, *Ib.* An Act of Parliament relating to a public highway is so far a public Act.

So the Courts will notice all other general laws, as that every corporation has a right of removing one of its members. *R. v. Lyme Regis*, Doug. 150. The privileges of the King's Palaces. *R. v. Elderton*, Ld. Raym. 980. And all privileges of the Crown, *Ib.* The Ecclesiastical Law. 1 Roll. Abr. 526; 6 Vin. Abr. 496.

The commencement of the sessions of Parliament. Plowd. 74; 1 Lev. 296; 2 Keb. 686. *Spring v. Eve*, 2 Mod. 240; D. Ld. Raym. 343; Moor, 551. The place of holding Parliament on a particular day. *Birt v. Rothwell*, Ld. Raym. 210. 343.

The prorogation of Parliament. 1 Lev. 296. The course of proceedings in Parliament, whether before one of the Houses, or before a Committee. *Lake v. King*, 1 Saund. 131. But not the Journals of either House. 1 Ld. Raym. 15.

So the Courts will notice all Courts of general jurisdiction, and their proceedings. 2 Lev. 176. As of the Court of Chancery. *Weaver v. Clifford*, Cro. J. 73. *Worlish v. Massey*, Cro. Jac. 607. And other courts at Westminster. *Lane's case*, 2 Co. 16, b. *Mounson v. Bourn*, Cro. Car. 518; W. Jones, 417; 4 Co. 93, b. The proceedings in the County Palatine Courts. 1 Saund. 84; 1 Sid. 331. Of the Courts in Wales. *Broughton v. Randall*, Cro. Eliz. 502. *Griffith v. Jenkins*, Cro. Car. 179. Of the Prerogative Court of the Archbishop of Canterbury. *Shelton v. Cross*, 1 Ford, 466. The practice of the Ecclesiastical Courts is a matter of fact to be proved by witnesses. *Beaurain v. Sir W. Scott*, 3 Camp. C. 388.

And will notice what Courts possess a general jurisdiction. *Tregany v. Fletcher*, Ld. Raym. 154. *Peacock v. Bell*, 1 Saund. 73; 1 Sid. 340. And the limits of their general jurisdiction. 2 Inst. 557. And their officers. *Ogle v. Norcliffe*, Ld. Raym. 860. See *Dillon v. Harper*, Ld.

Raym. 808; 6 Mod. 74. So every Court will notice the records of its own court, but not deeds enrolled, for these are merely the private acts of the parties, authenticated in court, nor the letters patent of another court. 10 Co. 92; Str. 520; 5 Co. 74, b.; Bac. Abr. Ev. 643. Nor the nature and extent of inferior courts. *Moravia v. Sloper*, Willes, 37.

Nor the proceedings of inferior Courts. *R. v. Vice-chancellor of Cambridge*, Ld. Raym. 1334. Nor of any particular jurisdiction, as of a dean and chapter to induct. Bro. Presentation al Eglise, pl. 13, Office, pl. 2. Nor that the lord of a particular franchise has the return of writs. Bro. Office, pl. 2. Nor of a particular liberty. March. 125. Nor of the Cinque Ports. 2 Inst. 557. Nor of an entry in the sheriff's book, referred to by an affidavit. *Russell v. Dickson*, 1 Bing. 442.

Nor foreign laws. *Mostyn v. Fabrigas*, Cowp. 174. *Wee v. Gally*, 6 Mod. 195; 4 T. R. 192. Nor of the laws of the plantations abroad. 6 Mod. 195. Nor of the seal of a foreign court. *Henry v. Adey*, 3 East, 221. *Black v. Lord Braybrooke*, 2 Starkie's C. 7.

(*m*) As the custom of merchants. *Soper v. Dibble*, Ld. Raym. 175. *Erskine v. Murray*, Ld. Raym. 1542. *Williams v. Williams*, Carth. 269. *Carter v. Downish*, *ib.* 83. The customs of gavelkind and Borough-English. *Doe d. Clements v. Scudamore*, Ld. Raym. 1025; 1 Bla. Com. 75; Co. Litt. 175; Cro. Car. 562.

But not of peculiarities not essential to tenures. 1 Sid. 138. *Brown v. Ricks*, 2 Sid. 153. *Saunders v. Brookes*, Cro. Car. 502. Such as a custom to devise. 2 Sid. 153. Or a gavelkind custom to hold by the curtesy, although the wife has no issue. 1 Sid. 138; 2 Sid. 153.

Nor of particular local customs. 1 Roll. R. 106; Doug. 96. 380. Such as of foreign attachment in London. *Spinke v. Tenant*, 1 Roll. 105. Or of carting whores. *Stainton v. Jones*, Doug. 379. *Argyle v. Hunt*, Str. 187; Fort. 319. But such customs are noticed in the city courts. Doug. 96. 381. And are noticed by the Courts at Westminster, after they have been certi-

regulation prescribed by public and competent authority; such as the ordinary computation of time by the calendar (*n*); or the known divisions of the kingdom (*o*); or any public matters recited in Acts of Parliament (*p*), royal proclamations (*q*), or other public documents, published by competent authority; the meaning of English words, terms of art, legal weights and measures, the ordinary admeasurement of time (*r*).

Matters
judicially
noticed.

Or any matter of legal presumption (*s*).

Legal pre-
sumption.

The nature of legal presumptions will hereafter be more fully considered; it has already been observed, that there are several distinct kinds of presumptions: 1st, absolute and conclusive presumptions, which, like the *præsumptiones juris et de jure* of the

fied. *Blacquiere v. Hawkins*, Doug. 363. The custom of the city, that every shop is a market overt, was certified by Sir E. Coke, Co. 83, b. The custom of foreign attachment was certified by Starkie, recorder of that city, 22 Ed. 4; Doug. 379. The custom of a feme covert being sole trader is also noticed. Burr. 1784.

(*n*) Str. 387; Ld. Raym. 994; 1 H. 7. 13; Bro. Error, pl. 134. *Pugh v. Robinson*, 1 T. R. 116; 1 Roll. Ab. 525. The fests and festivals appointed by the calendar. *Brough v. Perkins*, 6 Mod. 181. *R. v. Justices of Ipswich*, 2 Ford. 280. *Harvey v. Brand*, Salk. 626; 6 Mod. 148. The number of days in a particular month. 1 Roll. Abr. 524. The coincidence of the day of the week with that of the year. Cro. Eliz. 227; 1 Leo. 328. *Smith v. Bouch*, Ann. 72.

The beginning and end of term. Cro. J. 548; Jenk. 330; 12 Mod. 647. *Austin v. Bewley*, Cro. J. 548. *Dobson v. Bell*, 2 Lev. 176. *Ball v. Rowe*, Ld. Raym. 4. *Pullein v. Benson*, ib. 354. *Estwicke v. Cooper*, Ld. Raym. 1557.

But *quære*, whether the Courts will notice the end of a movable term. *Mitchell v. Ramsay*, Latch. 11. 118; 1 Roll. Abr. 304; Dyer, 181; 1 Sid. 308; Cro. Eliz. 210. Unless put in issue. *Courtney v. Phelps*, 2 Keb. 108, 109. 122. But see *Kynaston v. Jones*, Roll. Ab. 85; Mod. Ca. 196.

(*o*) The Courts will notice all counties, although they be inferior ones. March. 125; 2 Inst. 557. That a county is co-

extensive with a particular town. *R. v. Baker*, 18 & 19 Geo. 2. Also the ecclesiastical divisions of the kingdom. *Adams v. Terre-tenants of Savage*, 2 Ld. Raym. 854. But not that a town is in a particular diocese. *R. v. Simpson*, Ld. Raym. 1379; Str. 609. So the Courts will notice the extent of a port. *Fazakerley v. Wiltshire*, Str. 469. Of incorporated towns. *R. v. Blacksmiths' Company*, Mich. 4 Geo. 2.

Also the known divisions of the kingdom into counties; but the Courts do not notice the local situation of places within particular counties, or the distance of counties from each other. *Deybel's Case*, 4 B. & A. 243.

The Court will not notice without an averment, that Dublin, mentioned in a bill of exchange, is Dublin in Ireland. *Kearney v. King*, 2 B. & A. 301.

(*p*) As of a war with France, the war being mentioned in several statutes. *R. v. De Berenger*, 3 M. & S. 67.

(*q*) *Supra*, 233. The Court will take judicial notice, as a public matter affecting the government of the country, that an allegation that a revolted colony has been recognised as an independent state by this country, is false. *Taylor v. Barclay*, 2 Sim. 213.

(*r*) 1 Rol. Ab. 86. 525; 4 T. R. 314; 6 Vin. Ab. 492.

(*s*) According to the civil law, the effect of a legal presumption is "ut a probatione immunis sit qui vel presumptionem pro se habeat vel possessionem."—Heinecc. Pand. 441.

Legal pre-
sumption.

Roman law, admit of no proof to the contrary (*t*). 2dly, Legal presumptions which are applied by the Court, but which, like the *presumptiones juris* of the Roman law, admit of proof to the contrary (*u*). 3dly, Presumptions of law and fact, which admit of proof to the contrary, but which cannot be applied by the Court, without the aid of a jury (*x*). Lastly, mere natural presumptions, which do not depend upon any artificial force given by the law, but rest wholly on their own natural efficacy (*y*). Although in all cases, where a legal presumption arises, the party is relieved by it from the burthen of proof, yet whenever the presumption is not an absolute one, proof may still be necessary to meet the adverse evidence tending to overthrow the *primâ facie* presumption.

Neither a judge nor juror can notice facts within his own private knowledge; he ought to be sworn, and state them as a witness (*z*).

Questions
of law.

Secondly, It is the undoubted province of the Court, not only to expound the law as applicable to the facts (*a*), but also to decide upon all interlocutory matters which arise collaterally in the course of the trial. Previous to a few remarks upon the distinction between law and fact, it will be convenient to consider more particularly the process by which the law is applied to facts (*b*).

So infinitely varied and complicated are human affairs that no

(*t*) Vol. II. tit. PRESUMPTIONS.

(*u*) Ibid.

(*x*) Ibid.

(*y*) Ibid.

(*z*) *Partridge v. Strange*, Plow. 83, b.; *Packer's Case*, Kel. 12. The law was formerly otherwise. In taking recognitions of assize; the sheriff was bound to return such recognitors as knew the truth of the fact; and these, when sworn, retired from the bar, and brought in a verdict according to their own personal knowledge, without hearing any extrinsic evidence, or receiving the direction of the Judge. Brac. lib. 4, tr. 1, c. 19, s. 3; Ib. l. 4, c. 9, s. 2; 3 Bl. Com. 374. And when attaints came to be extended to trials by jury, as well as to recognitions of assize, the same doctrine was also extended to common jurors, that they might escape the heavy penalties of an attaint, in case they could show, by any additional proof, that their verdict was agreeable to the truth, although not according to the evidence produced; with

which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was again gradually exploded when attaints began to be disused, and new trials introduced in their stead: it is quite incompatible with the grounds on which new trials are every day awarded, viz., that the verdict was given without, or contrary to, evidence. See Sty. 233; 1 Sid. 133; 3 Bl. Com. 374. See *R. v. Sutton*, 4 M. & S. 532.

(*a*) After the jury are charged they can only state a question, and receive the law from the Court; the Court therefore refused to permit them to have a law treatise on the subject, which had been cited. *Burrowes v. Unwin*, 3 C. & P. 310.

(*b*) See Hale's P. C. 306; Sid. 235. *Goodman v. Cotherington*, Sty. 233; *Bennett v. Hundred of Hertford*, Tri. per Pais, 209. *Duke v. Ventris*, Salk. 205; B. N. P. 313. *Kitchen v. Mainwaring*, cited Andr. 321.

code of law can provide *à priori* for all possible predicaments which may happen; all that can be done is to annex consequences and incidents to certain defined combinations of circumstances described in general terms, capable of being applied to such particular modes or predicaments as may occur in practice. In order, then, to establish a claim or charge, circumstances must be alleged which show that the claim or charge is warranted in point of law, supposing those allegations to be true. In other words, the allegations upon the record are nothing more than an amplified specification of facts and circumstances which in point of law are essential to support the charge or claim. Thus, on a charge of larciny the indictment alleges all the particulars essential to the offence, a caption, and an asportation of specific property belonging to a particular owner with a felonious intention. Now with respect to every essential allegation, although the jury must find the facts, it is always for the Court to decide whether those facts, when proved, support the allegations in point of law. Thus, in the case of larciny, the jury must decide upon the evidence whether the prisoner removed the goods alleged to be stolen at all, and how far, and under what circumstances, he removed them; but whether such a removal be an asportation, sufficient to constitute felony, is pure matter of law. Hence, in order to substantiate every charge or claim as alleged on the record, it is essential that the jury should find some predicament or state of facts falling within the description contained in each essential allegation, and that the Court should adjudge such special modes or facts to be sufficient in law to sustain those allegations. This must be done in one or other of two ways; either the Court must inform the jury hypothetically, that the facts which the evidence tends to prove will, if proved, satisfy the allegations, being but particular modes which fall within the essentials enumerated in the general definition, or the jury must find those predicaments or modes specially, and then the Court can afterwards apply the law, and pronounce whether the facts proved be or be not such as satisfy the general and defined essentials to the charge or claim.

Questions
of law.

It is obvious, that in order to enable the Court afterwards to apply the law to the facts, the jury must find, not merely evidence or circumstances which *tend* to prove or disprove facts falling within the particulars which are essential to support the charge or claim, but must either find particular modes included within the description, or such facts as negative one or more of the circumstances essential to the charge or claim. Thus, if in the case of

The jury
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Law and
fact.

larciny, the jury were to find specially, that the prisoner *took* the goods described in the house of A. B. with the intention of stealing them, *removed* them for the space of 100 yards; and that A. B., the alleged owner had a special property in them as a bailee^a to carry the goods; then, as the finding would embrace facts which were special modes falling within each of the descriptive allegations essential to the offence, the Court would be enabled afterwards to apply the law by pronouncing the prisoner to be guilty. So if, on the other hand, the jury were in such case to find, *inter alia*, that a bale of goods was taken by the prisoner and removed, but that it still remained connected with the shop from which it was taken by a rope or chain, such a finding would negative every mode or species of asportation, and the Court would pronounce accordingly (c). But again, if the jury were in such case to find *mere evidence* (d), however cogent in its nature, of any of the essential facts, the Court could not draw the conclusion. Thus, if they were to find, that immediately after the goods were missed the prisoner was seized with the goods in his possession, and that he confessed that he was guilty, this might be abundant evidence to prove his guilt, but would be *mere evidence* (e), and the Court could pronounce no judgment.

Where a *general* verdict is given, the same process occurs at the trial; the jury decide what facts are proved, and receiving and

(c) See *R. v. Phillips*, East's P. C. 662.

(d) In the case of a special verdict, all the facts must be found on which the judgment is founded, and not mere evidence of facts. *Hubbard v. Johnston*, 3 Taunt. 309. But where a special case is reserved, if the circumstances be such as to enable the Court to say, without difficulty what ought to be the verdict of the jury upon them, the Court is at liberty to decide the question. *Thompson v. Giles*, 2 B. & C. 422.

(e) So where in trover the jury merely find a demand and refusal without expressly finding a conversion, or any fact which in point of law amounts to an actual conversion, the Court can give no judgment. Vol. II. tit. TROVER.

In the case of *Harwood v. Goodright*, Comp. 87, the jury found, that after the will had been executed by a testator, in favour of Harwood, he executed another

will, the contents of which were unknown; and it was contended by the heir at law that this amounted to a revocation. Lord Mansfield, in giving judgment, said, "In considering this special verdict, the duty of the Court is to draw a conclusion of law from the facts found by the jury, for the Court cannot presume any fact from the evidence stated. Presumption, indeed, is one ground of evidence; but the Court cannot presume any fact. In case the defendant had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation: but the jury, on the presumption, must have found the fact. So with regard to all other circumstances, as that the will was in the hands of the heir at law; that there were three attesting witnesses to the will, these would have been proper for the jury to have considered, but we are confined by the facts found by them."

applying the law expounded by the Court, as the Court would have applied it had the jury found the facts simply, pronounce a general verdict involving both law and fact.

It has been frequently doubted, whether a particular question be one of *law* or of *fact*. Thus far is clear, that whenever upon particular facts found, the Court, by the application of any rules of law can pronounce on their legal effect, with reference to the allegations on the record, such inference is matter of law. It is also clear, that whenever the Court cannot pronounce on the legal effect of particular facts, and where it is requisite, to enable them to do so, that the jury should find some other inference or conclusion, such further inference or conclusion is a question of fact. It is most emphatically true, that a jury can decide matters of fact only; they may indeed apply the law as delivered by the Court, but in this respect they act merely ministerially, under the direction of the Court.

General distinction between questions of law and of fact.

Every general verdict, and indeed every allegation on the record found by a jury to be true, involves matter of law as well as matter of fact; for it is always a question of law, whether the particular facts proved satisfy the allegations upon the record. Every legal definition, allegation, and every general verdict, involves both law and fact. Thus, in the simplest case, if the issue be whether *A.* assaulted *B.*, it involves a question of law as well as of fact: what *A.* did is a question of fact; whether what he so did amounted in law to an assault, is a question of law. Still the question for the jury is one of mere fact, for upon the advice of the Court, they find a general verdict, applying the law to the facts proved; or they find the facts, and the Court afterwards applies the law (*f*).

Hence it follows, that a question or inference of fact, is one which the jury can find upon the evidence by virtue of their own knowledge and experience, without any legal aid derived from the Court: and that an inference or conclusion of law, is one which the Court can draw from the mere circumstances of the case as ascertained by a jury, independently of any general inference or conclusion drawn by the jury.

In ordinary cases this distinction is perfectly clear; but it is now necessary to advert to a class of cases in which doubt has arisen, whether particular questions and inferences belong more properly to the Court or to the jury.

This occasionally happens where some general inference or conclusion is to be drawn from a number of particular facts and cir-

Instances of reasonable time, &c.

(*f*) An allegation of duty involves matter of law. *R. v. Everett*, 8 B. & C. 114.

Instances of
reasonable
time, &c.

cumstances appertaining to the individual case. As in the instances of reasonable time, probable cause, due diligence, and others of a similar nature.

It will be proper to consider the origin and nature of these questions a little more particularly. Every law, it has been observed, consists in the annexation of certain legal incidents to particular combinations of facts. Such definitions of necessity in the earlier and more simple stages of the law, and as matter of convenience at all times, must be of a general and abstract nature. No human sagacity can, in framing laws, provide specifically for the almost infinite variety of cases which occur in practice; and therefore all that can be done in many instances is to define, not by an enumeration of facts, which, in cases depending on a great variety of minute and varying circumstances would be impracticable, but by means of some general result or inference from them, as in the instances above alluded to, of reasonable time, due diligence, and probable cause.

For instance, the law cannot prescribe in general what shall be a *reasonable time*, by any defined combinations of facts (*g*). So much does the question depend upon the situation of the parties, and the minute and peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or to imply that this shall be done in a reasonable and convenient time; and this must obviously depend on the state of the weather and other circumstances which cannot from their nature form the basis of any legal rule or definition (*h*).

(*g*) By the general Inclosure Act, a rector or vicar is enabled to lease his allotment, "so that (*inter alia*) there be inserted in the lease, power of re-entry on non-payment of the rent or rents to be thereby reserved, within a reasonable time, to be therein limited, after the same shall become due." See the observations of Abbott, C. J., in *Smith v. Doe*, d. *Lord Jersey*, 2 B. & B. 592.

(*h*) *Eaton v. Southby*, Willes, 131. Where the plaintiff in replevin pleaded to an avowry, justifying the taking goods as a distress for rent in arrear, that he took the growing crops under an execution, and afterwards cut the wheat, and let the

same lie on the premises until the same in a course of husbandry was fit to be carried away; and that the defendant distrained the same before it was fit to be carried away; it was objected by the defendant, on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it was cut, that the Court might see whether it were a reasonable time or not. But the Court decided that the objection was untenable; for though in Co. Litt. 56, b. it is said that in some cases the Court must judge whether a thing be reasonable or not, as in the case of a reasonable fine, a reasonable notice, or the like, it would be

General terms then, such as reasonable time, probable cause (i), and others of a similar nature, being technical and legal expressions, Reasonable time, &c.

absurd to say, that in a case like the present the Court must judge of the reasonableness; for if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which would be ridiculous to be inserted in a plea. And the Court were of opinion that the matter was sufficiently averred; and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it.

So in the case of *Bell v. Wardell*, Willes, 202, where the defendant in trespass justified under an alleged custom for the inhabitants of a town to walk and ride over a close of arable land, at all *seasonable times*, it was held, that *seasonable times* was partly a question of fact, and partly a question of law; and on demurrer to the replication of *de injuriâ*, the Court said, as the custom is laid here, if it were not a *seasonable time*, the justification is not within the custom; and though the Court may be the proper judges of this, yet in many cases it may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a *seasonable time* or not. Accordingly, it is said in the case of *Hobart v. Hammond*, Cro. J. 204, that the reasonableness of fines must be determined by the Judges, either on demurrer or on evidence laid before a jury. For issues may be joined on things which are partly matters of fact, and partly matters of law; and then when the evidence is given at the trial, the Judge must direct the jury how the law is; and if they find contrary to such direction, it is a ground for a new trial.

(i) Although time be a necessary ingredient in almost every contract and legal obligation, yet inasmuch as the time for performing an act must depend upon a great number of varying circumstances, the law cannot lay down precise rules applicable to all cases, or do more than prescribe generally a reasonable time.

And in general, questions of reasonable time, reasonable care, due diligence, probable cause, and such like, depend so much on their own peculiar circumstances as not to admit conveniently of any general rules; and it is of greater convenience to depend on the judgment and discretion of a jury, deciding on a comparison of the circumstances with the ordinary course of practice, or with reference to the ordinary principles of fair and honest dealing, than to introduce such a multiplicity of legal rules and definitions as would be necessary for the due decision of cases subject to such infinite variety of circumstances. It is in truth a matter of important and obvious policy rather to refer questions of this nature as matters of fact to a jury, than to frame legal rules applicable to particulars. The difficulty of framing precise rules must, in such instances, be very great, for the reasons adverted to, unless they be founded on some prominent and decisive incidents: whenever the Court decided upon circumstances, the decision would become a precedent and rule of law; and as each decision would afford room by comparison for a great number of distinctions, the obvious effect would be to multiply such decisions and distinctions to a very inconvenient and burthensome extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others the inference of the jury, in point of fact, substantial justice is administered in simplicity, and free from the perplexity occasioned by nice and subtle distinctions and conflicting decisions. And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury: the law can thus deal in general definitions, and leave the rest as fact to the jury, without multiplying decisions and precedents; but if the Judges and not the jury were to decide, every decision would become a precedent, and legal distinctions would be multiplied to an excessive extent.

General terms involve questions of law as well as of fact.

sions, it is clear, in the first place, that in the abstract they involve matter of law as well as matter of fact ; for in the application of all legal expressions, it is a question of legal judgment and discretion to pronounce whether the facts as found by a jury do or not satisfy that legal expression or allegation (*k*). It is therefore in all cases for the Court to pronounce whether the facts show that the time was reasonable or the cause was probable in point of law ; just as it is for the Court to decide whether the facts found show an alleged asportation or conversion, or bankruptcy, in point of law (*l*).

But in particular cases the inference in law follows the inference in fact : where the Court cannot draw the inference that the time

(*k*) The question, whether the facts of a particular case fall within the general terms of a statute, is (at least usually) a question of law, whether the statute define the meaning of its own terms, or use them without definition, according to their ordinary acceptation and meaning. If a special verdict involve the question whether a party be a bankrupt, it is not essential that the jury should draw the conclusion ; the Courts may do it from the facts found. *Dodsworth v. Anderson*, 2 Jon. 142. So if the question be whether the party be a chapman within the stat. 5 Ann. c. 14, *Hearle, q. t. v. Boulter*, Say. 11 ; Bac. Ab. tit. stat. H.

The rule applies to all statutory expressions, and to all allegations in issue, however common and popular their sense and meaning may be. Thus, if the issue be, whether *C. D.* was an inferior tradesman (under the stat. 4 & 5 W. 3, c. 3, s. 10), although it would be for the jury to find whether *C. D.* was a tradesman, and to ascertain the nature and kind of trade, it would be for the Court to decide whether he came within the description in the statute. See Vol. II. tit. TRESPASS.

Executors shall have reasonable time to take the goods of their testator from his mansion. Litt. s. 69. This reasonable time shall be adjudged by discretion of the justices before which the cause dependeth. And so it is of reasonable fines, customs and services, upon the true state of the case depending before them ; for reasonableness in this case belongeth to

the wisdom of the law, and therefore to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex discretione judiciorum.* And this being said of time, the like may be said of things uncertain, which ought to be reasonable, for nothing that is contrary to reason is consonant to law. Co. Litt. 56 b. The question whether a market is held so near to another as to constitute a nuisance, is sometimes a question of law. Vol. II. tit. NUISANCE. Six days was held by the Court to be a reasonable time for removing the goods of a lessee for life by his executors after his death. *Stodden v. Harvey*, Cro. J. 204. Power is given to the lessor's son to take the house to himself on coming of age ; he must make his election within a reasonable time : a week or fortnight is reasonable ; a year is unreasonable. *Doe v. Smith*, 2 T. R. 436. A reasonable time for countermanding a trust was held to be a question of law, 1 B. & P. 388. In *Hurst v. Royal Exchange Assurance Co.*, 5 M. & C. 47, a laches of five days after intelligence of the loss, and before notice of abandonment was given, was held by the Court to be too long. What is a convenient time for the taking of a prisoner, by the sheriff, to prison, is a question for the Judge. Vol. II. tit. SHERIFF.

(*l*) The construction the law putteth on facts found by a jury, is in all cases undoubtedly the proper province of the Court. *Fost.* 256.

was reasonable or the cause probable, the jury must draw the conclusion in fact; and then the time will be reasonable or the cause probable in point of law, according as the one or the other is reasonable or probable in point of fact.

Hence it follows that the test for deciding whether such a general inference as to reasonable time, probable cause, &c. be one of law or of fact, is this: if the Court, in the particular case, can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one (*m*); for the rules and principles of law must prevail against the opinion of a jury (*n*). But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.

Reasonable time, when a question of law, when of fact.

Thus in the case of a bill of exchange, where the law requires notice of dishonour to be given within a reasonable time; if it appear on the facts proved in evidence, that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere question of law, for the law itself, from the mere *res gestæ*, makes the inference that the time was reasonable time (*o*). The duty of the jury in such a case is obviously confined to the finding and

Notice of dishonour of bill of exchange.

(*m*) This happens very generally upon the question of reasonable fines, customs and services. Co. Litt. 56 b. 59 b; 4 Co. 27 b. *Hobart v. Hammond*, Cro. J. 204. *Stodden v. Harvey*, Cro. Eliz. 583. So in the case of *Bell v. Wardell*, Willes, 202, *supra*, 452, where the plaintiff in trespass, justified under an alleged custom for the inhabitants of a town to walk and ride over a close of arable land at all seasonable times, but it appeared by the plea that the trespass was committed whilst the corn was standing; the Court, upon demurrer, decided that the time was not seasonable. See Lord Raym. 241. In *Wright v. Court*, 4 B. & C. 596, the Court held, on demurrer to a plea justifying an imprisonment on a suspicion of felony, that the detention of the plaintiff for three days, to give the prosecutor an opportunity for collecting witnesses, was an unreasonable time.

where the business is to know the truth of facts; and we call those questions of law where the matter is about reasoning on facts that are agreed on, in order to draw from them the consequences which may seem to establish the right of the parties. Domat's Pub. L., B. 4, tit. 1, p. 658.

(*o*) Vide *supra*, 258. *Williams v. Smith*, 2 B. & A. 496. *Wright v. Shawcross*, ib. 501. *Tindal v. Brown*, 1 T. R. 167. In the case of *Smith v. Doe d. Lord Jersey*, 2 B. & B. 592, Abbott, C. J. said "I conceive that in this as well as in all other cases Courts of Law can find out what is reasonable; and that in some cases they are absolutely required to do so. In many cases of a general nature or prevailing usage, the Judges may be able to decide the point themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite."

(*n*) We call those questions of fact

ascertaining of the simple facts and *res gestæ*; any inference of theirs upon the subject, that the time was or was not reasonable, would be either simply nugatory, or both nugatory and illegal.

Reasonable time, &c. where a question of fact.

Where, on the other hand, the law is silent, and does not by the operation of any principle or established rule decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable, or of probable or improbable, in point of fact (*p*). In such cases the legal conclusion follows the inference in fact; in other words, the question as to reasonable time, probable cause, &c., is one of fact, and the time is reasonable or unreasonable, or the cause probable or improbable in point of law, according to the finding of the jury in point of fact.

If the question be, whether reasonable notice has been given by the holder, of the dishonour of a bill of exchange; and the evidence be, that the holder gave notice by the next day's post, to an indorser, living at a distance; the question would be one of mere law, for it would fall within an express rule of law which determines such notice to be reasonable (*q*). But where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be one for the jury under all the circumstances of the case (*r*).

Standard of comparison, in the absence of a legal rule.

It is next to be observed, that these terms, in the absence of any precise rule of law, always import a comparison with some usual course and order of dealing, or have reference to general convenience, utility, and the plain principles of natural justice. Where the law is silent, the jury must draw the inference, not as their own casual fancies or arbitrary opinions may dictate, but according to their judgment and discretion, upon comparison of the facts with the general and understood course of dealing, if any such exist, in reference to the matter litigated; and in the absence of any such guide, with reference to mutual convenience and utility, or the

(*p*) As upon the question, whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, where no established rule of law prevails. See *Fry v. Hill*, 7 Taunt. 307; Vol. II. tit. BILL OF EXCHANGE.

Whether a particular covenant is an usual covenant in a lease; *Doe v. Sandham*, 1 T. R. 705, per Cur. K. B. Hil. 1828. What is a reasonable time for carrying away tithes; *Facey v. Hurdam*, 3 B. & C. 213. For removing a distress; *Pitt v. Adams*, 4 B. & A. 206.

(*q*) *Williams v. Smith*, 2 B. & A. 406.

Wright v. Shawcross, 2 B. & A. 501, n.; Vol. II. tit. BILL OF EXCHANGE.

(*r*) Per Lord Kenyon, in *Hilton v. Shepherd*, 6 East, 14, n. *Fry v. Hill*, 7 Taunt. 307. If the rule in the particular case be, that the act must be done within a reasonable time, and the Court be able to pronounce that the act was done in a reasonable time, the decision becomes a legal precedent. If the Court cannot decide on the evidence that the fact was done in a reasonable time, then a further finding as a fact that the time was reasonable, is essential.

ordinary rules of fair and honest dealing; for these, in the absence of any express rule of law, are the proper, and indeed the only, standards of comparison which the case admits of.

It follows, that such general questions of reasonable time, probable cause, due diligence, and the like, are never in the abstract necessarily either mere questions of law or questions of fact (*s*). Whether in a particular instance the question be of the one class or the other, depends simply upon the existence and applicability of a rule of law to the special circumstances, or *res gestæ*: if any such rule be applicable, the question is a mere question of law; if no such rule apply, the inference is one of mere fact for the jury (*t*). It may even happen that the very same circumstances which at one time would have raised a question of fact, may at a subsequent period raise a mere question of law; a rule of law which governs the case having been established in the interval (*u*).

Reasonable time, &c. is not in the abstract a question of mere law or mere fact.

Cases of this kind, where the jury are to find the special facts, and where the Court can decide upon the legal quality of those facts by the aid of established rules of law, independently of any general inference or conclusion to be drawn by a jury, have been sometimes termed *mixed questions of law and fact*. Thus it was said (*x*), that the question of reasonable notice of the dishonour of a bill of exchange was a mixed question. That the situation and

Mixed questions of law and fact.

(*s*) In the case of *Darbishire v. Parker*, 6 East, 18, Lawrence, J. expressed an opinion, that reasonable time was in general a question of law, because in the case of *Tindal v. Brown*, 1 T. R. 167, the jury found merely the circumstances. But with great deference to the opinion of that very learned Judge, it seems to be going too far to infer that reasonable time must always be a conclusion of law, because it was so considered in the particular case. In that case, the bill being dishonoured on the 5th, and notice not given till the 7th, although the parties lived within 20 minutes' walk of each other, the jury nevertheless found for the plaintiffs; but the Court held that there was a sufficient foundation for laying down a legal rule then but imperfectly established, as to the time of notice. Lord Mansfield said, "What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts, such as the distance at which the parties live from each other, the course of post, &c.; but whenever a rule can be laid

down with respect to this reasonableness, that should be decided by the Court, and adhered to by every one, for the sake of certainty."

These observations remove all difficulty; he does not say, that reasonable time must always be an inference of law upon the facts; but only, where the law can lay down a rule as to reasonableness; which can only be by recognizing a practice already established, or by applying legal principles to some defined combination of circumstances.

(*t*) Intention is a mere matter of fact, where the law does not infer the intention from the fact itself. Per Lord Mansfield, *R. v. Woodfall*, 5 Burr. 261. See tit. INTENTION, and MALICE.

(*u*) The rule as to notice to a tenant to quit, formerly was that reasonable notice should be given, but in the reign of H. 8, it was decided that six months' notice was necessary. See 6 East, 123, and see Vol. II. tit. BILL OF EXCHANGE.

(*x*) See *Darbishire v. Parker*, 6 East, 3; and the observations of Grose, J. ib.

Mixed
questions
of law and
fact.

places of parties, the post-hours, and other matters of that sort, are facts to be ascertained by the jury ; but whether under the circumstances notice was given in reasonable time, is a question of law, upon which they ought to receive the direction of the Judge. Now, it seems to be clear, that whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is matter of law ; and on the other hand, that whenever the special facts and circumstances are such that the Court cannot by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact as a mere question in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. It may therefore be doubted whether the expression ' mixed question of law and fact,' be in strict propriety applicable to the former class of cases. For wherever the law uses a general technical and abridged form of expression, the question arising upon it is partly a question of law, partly a question of fact ; the jury must in all instances find the facts which form the basis of the legal judgment, unless they be admitted by the parties ; and it is for the Court, in all cases, to decide upon the legal quality of those facts. So universal is this rule, that it applies even in those instances where, in the absence of any rule or principle of law, which enables the Court to draw the conclusion directly and immediately from the special facts, it is essential that the jury should draw the inference of reasonable time or probable cause, as a matter of mere fact ; for even here the adjudication by the Court, that the time is reasonable or the cause probable, involves matter of law as well as matter of fact, although the question whether the time be reasonable or the cause probable, in point of law, be dependent on the question whether it be reasonable or whether it be probable in point of fact. If the jury were by their verdict to find all the special facts, and were

The observations of Lord Mansfield and Buller, J. in *Tindal v. Brown*, 1 T. R. 167. The terming any question a mixed question of law and fact, is chargeable with some degree of indistinctness. Questions of fact and of law are not in strictness ever mixed ; it is always for the jury to decide the one, and the Court the other, however complicated the case may be. In some cases the main difficulty may consist in ascertaining the facts, where the application of the law to the ascertained facts admits of no doubt ; in another the facts

may be clear and simple, and their legal effect doubtful ; but still in each case the provinces of the Court and jury are perfectly plain and distinct. It is true that in some instances the Court could not, without the aid of a conclusion of fact drawn by a jury, apply the law ; but this consideration does not properly occasion any intermixture of or confusion of the respective functions of the court and jury ; for the latter, in drawing their conclusion, still confine themselves to mere matter of fact.

also to find that the time was reasonable in point of fact, the judgment of the Court upon this finding would still in all cases be matter of law. If in such a case the mere facts fell within any established rule or principle, the special inference made by the jury would be entirely nugatory, and the Court would apply the rule of law to the special facts; even although the legal inference should be contrary to the inference in fact (y). In the absence of any such rule, the judgment of the Court, that the time was reasonable, would follow the conclusion in fact; but it would involve that which is mere matter of legal consideration and judgment, that is, the adjudication that no legal rule applied to the facts, and that the question of law was consequently dependent on the question in fact. In strictness, therefore, as the legal application of every technical expression recognized by the law is partly a matter of fact and partly a matter of law, it may be doubted whether the terms 'mixed question of law and fact' serve accurately to distinguish any particular class of cases. All technical expressions whatsoever, such as asportation (z), conversion (a), acceptance (b), and the like, are in their application partly matters of law, partly matters of fact.

These observations may not, perhaps, be deemed to be altogether unimportant, when it is considered how essential it is to preserve the distinction between law and fact, and to prevent any misconception as to the relative functions of courts and juries (c).

Some of the cases to which these principles apply will next be adverted to. Reasonable time is always a question of fact, in the absence of any rule or principle of law applicable to the circumstances. Thus, in an action for not removing goods distrained for rent, after the expiration of five days, it is a question for the jury, whether they were removed within a reasonable time afterwards (d). So whether the sheriff or his agents have used due diligence in attempting to discover and arrest a defendant under civil process (e).

Reasonable
time.

In the case of *Noble v. Kennaway* (f), where the defence to an action on a policy of insurance was, that there had been unne-

(y) For it would be a wrong conclusion in point of law. See 6 T. R. 466.

(z) See Vol. II. tit. LARCINY.

(a) See Vol. II. tit. TROVER.

(b) See Vol. II. tit. FRAUDS, STATUTE OF.

(c) It is of the greatest consequence to the law of England, and to the subject, that the powers of the Judge and jury be kept distinct; that the Judge determine

the law, and the jury the fact: and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. Per Hardwicke, C. J., *R. v. Poole*, B. R. H. 23.

(d) Vol. II. tit. DISTRESS.

(e) Vol. II. tit. SHERIFF—NEGLIGENCE.

(f) Doug. 492.

Reasonable
time.

cessary delay in unloading the cargoes, it was held, that this was a question to be decided by a jury, who could not decide without being informed as to the usual practice of the particular trade. Where the defence to an action for the price of goods sold and delivered was, that they did not correspond with the sample, it was left to the jury to say whether, under the circumstances, the defendant had rejected the goods within a reasonable time (g).

In the cases of *Tindal v. Brown* (h), and *Darbishire v. Parker*, it was said (i), that what is reasonable notice of the dishonour of a bill of exchange is a question of law arising upon the facts; and that a jury in such cases ought to receive the directions of the Judge; a position incontrovertibly true wherever the law affords a rule which governs the case, for then the finding of the jury, that the time is reasonable or unreasonable in point of fact, cannot be placed in competition with the settled rules and principles of law, and can never prevail but where the law is silent, and where the general rules of law, founded upon a knowledge and experience of their general utility, are from the peculiar nature of the case supposed to be inapplicable.

Probable
cause.

The existence of probable cause has frequently been treated as a question or inference of law (k). But although it be clear that it is sometimes a question of law, in practice it is not unfrequently a question of fact for the jury (l). And this must in principle happen in all cases where the result depends on the combined effect of a variety of circumstances to which no particular rule or principle of law is applicable.

The probable cause of prosecution must necessarily consist in the circumstances of the case within the defendant's knowledge, which tended to throw suspicion on the plaintiff. The existence of such circumstances, and their force and tendency, are questions rather of fact than of law; for the effect must be measured by sound sense and discretion rather than by any rule of law, which cannot measure mere probability. If such circumstances did exist, it is to be presumed that the defendant acted upon them, but this is not to be conclusively presumed; for it seems to be clear, that

(g) *Parker v. Palmer*, 4 B. & A. 387.

(h) 1 T. R. 187.

(i) 6 East, 10.

(k) See *Candell v. London*, 1 T. R. 520, n. *Johnston v. Sutton*, 1 T. R. 543. *Reynolds v. Kennedy*, 1 Wils. 232. *Goldring v. Crowle*, B. N. P. 14.^a *Infra*, Vol. II. tit. MAL. PROS. In the case of *Hill v. Yates*, 2 Moore, 80, where a constable jus-

tified the apprehension of the plaintiff under the stat. 15 C. 2, c. 2, s. 2, which authorizes a constable to apprehend persons whom he suspects to be carrying a burthen of young trees, it was held, that the question of probable cause was for the Judge, and that he could not leave it to the jury.

(l) *Brooks v. Warwick*, 2 Starkie's C. 389. *Isaacs v. Brand*, ib. 167.

if, notwithstanding the existence of unfavourable circumstances, the defendant knew that the plaintiff was innocent, he would be liable in damages; for as to him, who was better informed, the circumstances could afford no probable cause or ground of accusation (*m*).

The inference of fraud is also in some cases a mere question of law arising upon the facts; in others it is a mere matter of fact (*n*). Where a trader alienes the whole of his effects, he is guilty of fraud against his creditors, and commits an act of bankruptcy; and the Court will infer fraud from the facts, without the aid of a jury (*o*). So under the stat. of Eliz., where a transfer is made of chattels without delivery of the possession (*p*).

If a creditor, knowing that his debtor was going to break, were, before any direct act of bankruptcy, to procure payment by *threats*, the law would pronounce that this was not fraudulent (*q*).

(*m*) See Haw. b. 2, c. 12, s. 15. *Sir Anthony Ashley's case*, 12 Co. 92. *Davis v. Russell*, 5 Bingh. 354; where the Judge having directed the jury to consider whether the circumstances afforded the defendant reasonable ground for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done, the Court held that the direction was *substantially* correct. Best, C. J., in giving judgment, observed, it was for the jury to say whether they believed the facts; and, if they believed them, whether the defendant was acting honestly. In *Beckwith v. Philby*, 6 B. & C. 637, Littledale, J. directed the jury to find for the defendants, if they thought on the whole that the defendants had reasonable cause for suspecting the plaintiff of felony. And Lord Tenterden said, whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury. If A., having an opinion of counsel in his favour, arrests B., he is not liable to an action for a malicious arrest, if he acted honestly on that opinion; *secus*, if he proceeded to arrest, believing that he had no cause of action. Whether he did so or not is a question of fact for the jury. *Ravenga v. Macintosh*, 2 B. & C. 693; Vol. II. tit. MALICIOUS ARREST.

(*n*) Per Lord Mansfield, in *Fowcraff v. Devonshire*, 2 Burr. 931. 937. Fraud and covin is always a question of judgment of law on facts and intention; per Lord Ellenborough, in *Doe v. Manning*, 9 East, 59. But the *intention* is frequently a question of fact. Upon an issue taken generally on an allegation of fraud, it is a question of *fact*, and if there be no fraud in fact, there is none in law; per Buller, J. *Pease v. Naylor*, 5 T. R. 80, on a general replication of fraud, to plea by executor of outstanding judgments. Fraud in taking a tenement is a question of fact in a settlement case. Vol. II. tit. SETTLEMENT. The obtaining a bill of exchange by fraud is a question of fact. *Grew v. Bevan*, 3 Starkie's C. 134. So whether a party in taking a bill of exchange (which turns out to have been lost or stolen) acted with a sufficient degree of prudence and caution. Vol. II. tit. BILL OF EXCHANGE.

(*o*) *Newton v. Chantler*, 7 East, 145. *Linton v. Bartlett*, 3 Wils. 47. *Wilson v. Day*, 2 Burr. 827; *supra*, 174. See the observations of Buller, J. in *Estwick v. Caillaud*, 5 T. R. 420. Vol. II. tit. FRAUDULENT CONVEYANCE.

(*p*) *Edwards v. Harben*, 2 T. R. 587. *Bamford v. Baron*, cited ib. in not. *Reid v. Blades*, 5 Taunt. 212.

(*q*) Per Lord Mansfield, 2 Burr. 938.

Or the question may be one of fact for the jury. As where it depends not on the mere act done, but upon the particular intention with which it was done (*r*). As where a trader conveys part of his property (*s*), or a debtor assigns his property, to defraud creditors (*t*). So it is a question of fact, whether fraud has been practised in procuring a blind man to execute a will (*u*).

Malice and
intention.

The inference as to *malice* and *intention*, also, may be one either of mere law, as in cases of homicide, where the law frequently infers a malicious intention from the facts, independently of any conclusion drawn by the jury (*x*).

Or of mere fact, as in all cases where some malicious intention in particular is essential to the offence (*y*); or where the nature of an act depends on the particular intention of the parties (*z*). The question whether a party had knowledge of a particular fact, is usually a question of fact to be left to the jury (*a*).

Negli-
gence, &c.

The question whether a sheriff, attorney or agent, has been guilty of negligence, is usually one of fact for the decision of the jury (*b*).

What shall be said to be the next sessions, that is, the next practicable sessions, for an appeal against a removal order, is a question of fact, inasmuch as it frequently depends on the particular situation of the parties, and the circumstances of the case (*c*).

Reputed ownership, it seems, is a question of fact rather than of law (*d*).

(*r*) Vol. II. tit. INTENTION.

(*s*) *Newton v. Chantler*, 7 East, 145; Vol. II. tit. BANKRUPT.

(*t*) Vol. II. tit. FRAUDULENT CONVEYANCE.

(*u*) Per Heath, *J. Longchamp v. Fish*, 2 N. R. 418.

(*x*) See Vol. II. tit. MURDER—LIBEL—MALICIOUS PROSECUTION—MALICIOUS ARREST.

(*y*) Vol. II. tit. INTENTION—MALICE—MALICIOUS INJURIES—LIBEL.

(*z*) *Power v. Smith*, 5 B. & A. 550. So according to the civil law, "Quicumque intentionem facto superstruit factum id tenetur probare, ut non neganti sed affirmanti incumbat probatio." The intention of the parties in paying or receiving rent is for the jury. Per Gould, *J.* 1 H. B. 312. *Goodright v. Corder*, 6 T. R. 319.

(*a*) *Harratt v. Wise*, 9 B. & C. 712; where it was held that knowledge on the

part of the captain of a vessel, of the fact that a foreign port was in a state of blockade, was not to be presumed on the ground that notice to a State was notice to all the subjects of that State, but was to be proved as matter of fact. It is a question of fact for the jury to whom credit was given by the vendor of goods. *Leggatt v. Reed*, 1 Carr. C. 16. *Bentley v. Griffin*, 5 Taunt. 356. To what purpose trees cut down by a tenant, were intended to be applied by him, *Doe v. Wilson*, 11 East, 56; Vol. II. tit. COPYHOLD. On a prosecution for larceny, the *quo animo* is for the jury. *R. v. Phillips*, East's P. C. 662. Vol. II. tit. LARCENY.

(*b*) Vol. II. tit. NEGLIGENCE.

(*c*) *R. v. Coodo*, 4 Burn. 603, 23d ed. *R. v. Justices of the East Riding of Yorkshire*, ib. See *R. v. Justices of Essex*, 1 B. & A. 210.

(*d*) Per Buller, *J.* in *Walker v. Burnell*,

An allegation that a person is employed in the service of the Customs is an allegation of fact; the allegation that it was his duty as *such* to seize goods which on importation are forfeited, is matter of law (*e*).

The construction of a written document is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself. As in the instances of judicial records, deeds, &c. (*f*); but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury. Thus in the case of libel, the meaning of the writer, and the truth of the inuendos, are questions of fact. So in a prosecution for sending a threatening letter, the question, whether it contains a threat, if doubtful, is to be decided by the jury (*g*). The construction of all deeds and other express contracts is matter of law for the decision of the Court (*h*). And where the agreement is not contained in any formal instrument, but is collected from letters which have passed between the parties, their construction, where their terms are plain and unambiguous, is also for the consideration of the Court; but where they are written in so dubious and uncertain a manner as to be capable of different constructions, and can be explained by other circumstances, it is for the jury to decide on the whole of the evidence (*i*). And it seems that in general, where the evidence of a contract is matter of inference from circumstances, it is a matter of fact for the jury (*h*).

Construction of written documents.

Doug. 317. And per Lawrence, J. in *Horn v. Baker*, 9 East, 241. But it is not unfrequently a question of law; *infra*, Vol. II. tit. BANKRUPTCY.

(*e*) *R. v. Everett*, 8 B. & C. 114.

(*f*) See Vol. II. tit. PAROL EVIDENCE—WILL. Where there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration; but if premises be described in general terms, and a particular description be added, the latter controls the former. *Doe v. Galloway*, 5 B. & A. 43.

(*g*) *Girdwood's case*, Leach, C. C. L. 169.

(*h*) Per Lord Mansfield, *Macbeath v. Haldimand*, 1 T. R. 180.

(*i*) Per Buller, J. *ib.* Note, that Willes, J. in the same case was of opinion that the construction of letters generally was pro-

per for the consideration of the jury; but Buller, J. intimated his dissent from the general proposition. In *Stammers v. Dixon*, 7 East, 200, where the question was whether a piece of land was parcel of the plaintiff's freehold, or of the defendant's copyhold estate, and evidence was given of acts of ownership, and also of copyhold admissions, it was held that the effect of the admissions was matter of law for the opinion of the Court; and the result of that case seems to be, that the jury were to find upon the whole of the case, giving effect, as far as the documents were concerned, to the construction put upon them by the Court.

(*k*) The assent of the master to the service of the apprentice with another, is an inference of fact for the justices at sessions. See Vol. II. tit. SETTLEMENT.

It is the peculiar province of the jury to draw the proper conclusion in fact from mere circumstantial evidence of the fact, and to deduce the proper inference in all cases of indirect evidence, except in those instances where the law makes particular facts the foundation of a legal presumption; and even in such instances, where the legal presumption is not conclusive, it is still for the jury to decide on the evidence whether the legal *prima facie* presumption or intendment is repelled by contrary evidence.

Collateral
matters of
law.

It also belongs to the Court to decide all collateral matters arising in the course of the trial. Thus it is for the Court in all cases to determine upon the competency of witnesses, and the admissibility of particular evidence with reference to the facts in issue, or to the allegations on the record, even although the admissibility of the evidence should depend on matter of fact. Thus it is a question for the Court whether a declaration made by one in *articulo mortis* be admissible under the circumstances of the case (l).

It is also the province of the Court to decide all matters which depend on an inspection of the record (m).

The Court will, *ex officio*, exclude illegal evidence, without regard to the compact of counsel (n).

Bill of ex-
ceptions.

A party who is dissatisfied with the decision of the Court in point of law, may either tender a bill of exceptions, or, which is the more modern practice, may afterwards move for a new trial.

A bill of exceptions is founded upon some objection to the direction or decision of the Judge at *nisi prius*, or of the Court upon a trial at bar (o), as to the admissibility of evidence (p), the competency of witnesses (q). The stat. 13 Ed. 1, s. 31, enacts

(l) So held by all the Judges. See *R. v. Hucks*, 1 Starkie's C. 523, Vol. II. tit. ADMISSIONS.

(m) *R. v. Hucks*, 1 Starkie's C. 522. Note, the question there was, whether a word in a record was *meeting* or *mutiny*.

(n) *Shaw v. Roberts*, 2 Starkie's C. 455. So the parties cannot by private stipulation bind a court of justice not to call for that proof which the law has rendered necessary. They cannot make proof of the policy sufficient, where the stat. 19 G. 2, c. 37, prohibits the recovery without further proof than the policy. 6 East, 321.

(o) *Rouee v. Brenton*, 3 Man. & R. 266.

(p) *Salk*. 284. If the contention be

whether the facts proved *tend* to prove the issue, the party objecting ought to demur to the evidence. *Bulkely v. Butler*, 2 B. & C. 434.

(q) 3 T. R. 27. For improperly directing a nonsuit. *Strother v. Hutchinson*, 4 Bing. N.C. 83. *Qu.* and see *Doe v. Fisher*, 2 Bligh M. S. 9. So if the Judge tell the jury that there is evidence where there is none. *Bulkely v. Butler*, 2 B. & C. 434. Where the reception of evidence depends upon some fact which is *disputed*, and of which the Court and not the jury is the proper judge, it may be very doubtful whether the decision of the Judge can afterwards be brought in question by means of a bill of exceptions;

that, "when one (r), that is impleaded (s) before any of the Justices, doth allege an exception, praying that the Justices will allow it, which if they will not allow, if he that hath alleged the question do write the same exception, and require that the Justices will put their seals for a witness; the Justices shall do so; and if one will not, another of the company shall; and if the king, upon complaint made of the Justices, cause the record to come before him, and the same exception be not found in the roll, and the party show the exception written, with the seal of the

Bill of exceptions.

for this would be to constitute the Court of error a court for deciding not upon the law but upon the fact, and that too in a case which might depend altogether on a balancing of the credit due to conflicting testimony. In the case of *Bell v. The Hull and Selby Railway Company*, T. T. 1840, one of the questions was, whether the Judge at *Nisi Prius* had properly rejected a witness tendered for the defendants on the ground of interest, the witness having stated that he had been a shareholder, but that he had a few days before assigned his shares to the treasurer of the Company in order to qualify himself to be a witness, that he conceived himself to have transferred his interest, and that he had to rely only on the honour of the transferee for a re-transfer, but that in case of refusal, he should apply to a Court of Equity for redress. The Judge had rejected the witness on the ground that the transaction was merely collusive. For the plaintiff, it was contended, (*inter alia*) that the question whether the transaction was collusive or not, was one of fact for the Judge at *nisi prius*, and that his decision could not be questioned in Bank, any more than if the question had been raised upon a bill of exceptions tendered. But the Court intimated that the decision of the Judge might be questioned on a motion for a new trial, although not upon a bill of exceptions tendered. *Qu.* and see *Wright v. Doe d. Tatham*, 7 Ad. & Ell. 356; and the observations *ib.* of Tindal, C. J. on the case of the *Bishop of Meath v. The Marquis of Winchester*.

(r) The stat. extends to a plaintiff as well as a defendant. 2 Inst. 427.

(s) The words are, *si aliquis implicatur*; hence it has been said that it does

not apply in a criminal case. *Sir H. Vane's case*, Kel. 15. *Lord Grey's case*, 1 Vern. Ch. Cases, 175. It does not lie on an indictment for treason or felony. 2 Haw. c. 46, s. 610.

But it has been allowed on an indictment for trespass. *R. v. Lord Paget*, 1 Leon. 5. And also on an information in the nature of a *quo warranto*. *R. v. Higgins*, 1 Vern. 366; *sic R. v. Nutt*, 1 Barnard. 307. It does not lie before Justices on the trial of an appeal. R. T. H. 251. Nor in any case where a writ of error does not lie. B. N. P. 316. The stat. extends to a trial at bar as well as to one at *nisi prius*. *Thurston v. Stratford*, 3 Salk. 155; Skinn. 354; *contra, R. v. Smith*, 2 Show. 287.

R. v. Broughton, Str. 1229; 1 Sid. 85; 1 Keb. 384; 1 Lev. 68; 2 Inst. 427; 2 Haw. c. 46, s. 210. Lord Coke says, the stat. extends to all actions real, personal, and mixed, but makes no mention of criminal cases. Lord Hardwicke considered this to be a point not then settled. *R. v. Inhabitants of Preston*, R. T. H. 251. He said, a bill of exceptions had been allowed in informations in the Exchequer, which are civil suits for the king's debt; but that it had never been determined to lie in mere criminal proceedings. *Ib.* And see *R. v. Stratton and others*, Howell's St. Tr. vol. 21, p. 1187. It has been held that it does not lie on the trial of a *feigned issue* out of Chancery. *Bullen v. Mitchell*, 2 Price, 416. Wood, B. *dissentiente*. A bill of exceptions cannot be allowed by justices of the peace at the quarter sessions, on an appeal against a removal order. For no writ of error lies in such case, B. N. P. 316. But it lies on the direction of a sheriff to a jury in the county court. *Strother v. Hutchinson*, 4 Bing. N. C. 83.

Bill of ex-
ceptions.

Justice affixed, the Justice shall be commanded that he appear at a certain day to confess or deny his seal; and if the Justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." If the Judge admit the matter to be evidence, but not conclusive, where in point of law it is conclusive, the course is to demur to the evidence (*t*), because (as it is said), although the evidence be conclusive, the jury may hazard an attainit if they please (*u*); as where the Judge leaves it to the jury whether the probate of a will be evidence to prove the devise of a term for years (*w*). The statute is silent as to the time of tendering the bill, but it has been held, on reason and principle, that it must be done at the trial, for the party may have misled his adversary by not insisting on the objection at the time (*x*); if he had stood upon his exception, the adversary might have had more evidence, and need not have put his cause upon that point. It need not, however, be put in form then, although the substance of it ought to be put into writing, since it is to become a record (*y*).

Form of
the bill.

If the bill be annexed to the record, it begins with the proceedings after issue joined, and proceeds to state the circumstances upon which it is founded: that a particular witness was called to prove certain facts, or evidence offered to prove such facts (*z*), or

(*t*) See Demurrer to Evidence, *infra*, 487.

(*u*) T. Raym. 104, 5; T. Jon. 146.

(*w*) See Tidd's P. 773, 4th edit.

(*x*) 1 Salk. 288, 9.

(*y*) Per Holt, C. J., 1 Salk. 288, 9; Tidd, p. 773, 4th edit.

(*z*) Where the object for which evidence is offered, but rejected, is obvious, and must have been understood by the Judge and the jury, it is not necessary that that object should be specially stated. *Doe v. Earl of Jersey*, 3 B. & C. 870. In the case of *Bulkely and others v. Butler*, in error, 2 B. & C. 434, where the question on which a bill of exceptions was tendered, was whether there was sufficient evidence that the bill on which the action was brought was indorsed by *E. S.*, the payee, the record, when brought into the Court of K. B., after setting out the pleadings and continuances, stated that on a certain day the cause came on to be tried; that one *W. B.* was produced and examined as a witness for the plaintiff, and stated that, &c.; on cross-examination, he stated that, &c.; (see the evidence, Vol.

II. tit. BILL OF EXCHANGE); and then, upon no other evidence being adduced of the person calling himself *E. S.* being the payee of the said bill in the declaration mentioned, the counsel for the defendant objected to the evidence so given as aforesaid by the said plaintiff in support of the said issue joined between the said parties, and that there was no proof to go to the jury of the identity of the said person calling himself *C. S.* with the said *E. S.* the payee of the said bill; and then and there prayed the said Chief Justice that he would declare to the jury that there was no evidence before them of the indorsement of the said bill of exchange by the payee before mentioned; yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that although in law there should be some proof of the identity of the person making the endorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange; and the said Chief Justice did further deliver his opinion, that the said evidence above set

challenge made, or demurrer tendered; the allegations of counsel on the admissibility or effect of evidence; the opinion of the Court or Judge, and the exception of counsel to that opinion, and the verdict of the jury (*a*). Where the bill is not annexed to the record, it is necessary to set out the whole of the proceedings previous to the trial (*b*).

The Judge either sets his seal to the exceptions, or refuses to do so because the bill contains matters which are not true (*c*). On *refusal*, the party may have a writ founded on the statute, containing a surmise of an exception taken and overruled, and commanding the Justices, that if it be so, they put their seals to the bill (*d*). If they return *quod non ita est*, an action lies for a false return, in which the surmise may be tried; and if it be true, the plaintiff recovers damages, and a peremptory writ issues (*e*).

Course of proceeding upon it.

The bill of exceptions, when sealed, is not used until judgment has been signed, and a writ of error brought to remove the proceeding into the Court above (*f*), for the proceeding is in the nature of an appeal (*g*). On the return of the writ of error, the Judge being called on by the Court, either confesses or denies his seal; if he confess it, the proceedings are entered of record, and the other party assigns error; if he denies his seal, the plaintiff may take issue upon it, and prove it by witnesses (*h*).

Bill of exceptions.

The Court will not grant a motion, for a new trial where a bill of exceptions has been tendered, unless the bill of exceptions be abandoned (*i*). And a bill of exceptions is waived by bringing

forth was reasonable evidence to be left to the jury whether the said indorsement was the indorsement, &c.; and thereupon, with that direction, left the same to the jury, who declared themselves to be satisfied of the identity of the said *E. S.*; concluding in the usual form. Holroyd, J. in giving judgment, observed, the real question was, "whether this evidence was or was not admissible, either as containing the declarations of persons not called as witnesses, or as having no tendency to prove the matters in issue. If the objection was known *a priori*, it should have been made before the evidence was given; but if it was not discovered till afterwards, then the Judge should have been requested to strike the evidence out of his notes; and if after that he persevered in summing it up to the jury, that would have been a good ground for tendering a bill of exceptions; but if, as appears to me to have

been the case, the contention was whether, admitting the facts deposed to, they tended to prove the issue, there should have been a demurrer to the evidence." The judgment was affirmed.

(*a*) 3 T. R. 27; 2 Lut. 984; 1 Salk. 284. As to the form of the bill, see Tidd's Pr. 774, 4th ed.; Brownl. 129. 131. *Money v. Leach*, B. N. P. 317. *Fabrigus v. Mostyn*, 11 St. Tr. 187; Tidd's Pr. Append. 38.

(*b*) B. N. P. 317.

(*c*) Show. 120.

(*d*) 2 Inst. 427; B. N. P. 316.

(*e*) 2 Inst. 427.

(*f*) 1 Salk. 284; B. N. P. 316; 1 Bl. R. 679; Cowp. 501; 3 Bl. Com. 372; see 2 Lev. 236. And therefore where no writ of error lies there can be no bill of exceptions.

(*g*) 3 Bl. Com. 372.

(*h*) 2 Inst. 438.

(*i*) 2 Chitty's R. 272.

a writ of error before the Judge's signature has been obtained, and the party will then be precluded from appending the bill to the writ of error (*j*). Where the objection is to the reception of evidence as inadmissible, the party ought, if aware of the objection, to object to its reception; if not apprised previously, he ought, after it has been received, to request the Judge to strike it out of his notes, and if the Judge persist in retaining it and stating it to the jury, the proper course is to tender a bill of exceptions; but if the contention is, whether the evidence, being admissible, tends to prove the issue, the proper course is to demur to the evidence (*k*).

The Court of Error may look into the whole of the matters set out on the record, to enable them to pronounce their judgment (*l*).

Demurrer
to evidence.

A party who admits the facts which the adverse evidence tends to prove, but desires to withdraw the application of the law to those facts from the jury, and to submit them for that purpose to the Court above, is at liberty to do so by his demurrer to the evidence (*m*). But his demurrer cannot be allowed unless he admit the truth of the facts which the evidence of his adversary, though it be but presumptive or circumstantial, tends to prove (*n*). For though he has a right to submit the legal effect of the facts to the judgment of the Court, yet, as the jury are the proper judges of matters of fact, the evidence must either be submitted to the jury, or the facts themselves must be admitted (*o*). The Judge, it seems, may overrule the demurrer if he think proper, and leave the case to the jury (*p*).

And if in the case of an information or any other suit evidence be given for the King, it is said that the King's counsel cannot be

(*j*) *Dillon v. Parker*, 1 Bing. 17. But where a bill of exceptions had been sent to the plaintiff, that he might agree to it or suggest alterations before being signed by the Judge, and on the same day the defendant sued out a writ of error, it was held, that notwithstanding this the plaintiff was bound to express his assent or dissent, and return it. *Willans v. Taylor*, 6 Bing. 512.

(*k*) *Bulkely v. Butler*, 2 B. & C. 434; *supra*, 466.

(*l*) *Vines v. The Corporation of Reading*, 1 Y. & J. 4. *Smyth v. Latham*, 1 C. & M. 568. If the Court decided in favour of the objection, they would either award a *venire de novo* or reverse the judgment, but they cannot award a *ventre*

de novo to an inferior Court. *Strother v. Hutchinson*, 4 Bing. N. C. 83.

(*m*) Where the King is a party, his counsel cannot be compelled to join in demurrer; but the Court ought to direct the jury to find the special matter. *Baker's case*, 5 Co. R. 104; *infra*, 531.

(*n*) *Gibson v. Hunter*, 2 H. B. 187. *Wright v. Pindar*, Alleyne, 18. *Cocksedge v. Fanshaw*, Doug. 119.

(*o*) *Ib.* and see *Baker's case*, 5 Co. 104; B. N. P. 314. But on a demurrer to evidence, the Court may draw the same inference a jury would have drawn. *Vere v. Lewis*, 3 T. R. 182. No objection can be taken to the pleadings. *Cort v. Birkbeck*, Doug. 218.

(*p*) *Worsley v. Fillisher*, 2 Roll. R. 119.

compelled to join in a demurrer to the evidence, but that in such a case the Court ought to direct the jury to find the special matter (q). Demurrer to evidence.

Where the demurrer is allowed, the usual course is for the Court to give order to the associate to take a note of the evidence, which is signed by counsel, and affixed to the *postea* (r). But if the Court overrule the demurrer improperly, the party may tender a bill of exceptions (s).

A demurrer to evidence lies in an inferior Court (t).

The ancient practice of tendering bills of exceptions demurring to the evidence, or proceeding against the jury by writ of attain, has in a great measure been superseded by the more modern (u) practice of moving the court for a new trial; in the granting or refusing of which the Courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice and equity (v). New trial.

The two principal grounds (w) for this motion, with reference to the present subject, are,

- 1st, Some misdirection or misruling on the part of the Judge; or,
- 2dly, Error or misconduct (x) on the part of the jury (y).

(q) *Baker's case*, 5 Co. 104; B. N. P. 313.

(r) B. N. B. 313. The damages may be assessed conditionally; or if necessary, a writ of inquiry may be executed after the Court has given judgment. B. N. P. 314, and see *Herbert v. Walters*, 1 Lord Ray. 60; Plowd. 310; and *Miller v. Warre*, 1 C. & P. 239.

(s) 2 H. B. 208.

(t) As in the Palace Court. 1 Lev. 187.

(u) See the observations of Lord Mansfield in the case of *Bright v. Eynon*, 1 Burr. 390, where he observed that a verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or rather a certainty, that justice has not been done. And see the judgment of Wood, B. in *Stevens v. Aldridge*, 5 Price, 392. (v) *Ib.*

(w) Where the attorney had permitted the cause, through inattention, to be called on and tried as an undefended cause, the Court refused to grant a new trial, although it was sworn that there was a good defence upon the merits. *Breach v. Casterton*, 7 Bing. 224. See also *Watson v. Reeve*, 5 Bing. N. C. 112.

(x) Where the conclusion of the jury is a reasonable inference from the evidence, the Court will not disturb the verdict, even in a criminal case. *R. v. Burdett*, 4 B. & A. 167. In general, the Courts will not grant a new trial in case of a verdict against evidence, where the verdict is on the honest side of the cause. Per Bathurst, J. in *Goslin v. Wilecock*, 2 Wils. 302; and he cited *Smith v. Page*, 2 Salk. 644, as a strong case to that effect.

(y) If the verdict be manifestly against the justice of the case, and the Judge's direction, the Court will grant a new trial without costs, though the damages be under 20 l. Per Buller, J. in *Jackson v. Duchaire*, 3 T. R. 553. Where the jury found a verdict with 20 s. damages, in a gross case of slander, the Court refused a new trial. *Kendall v. Hayward*, 5 Bing. 424. And in general a new trial will not be granted where the verdict for the plaintiff is for a sum under 20 l. *Sowell v. Champion*, 6 Ad. & Ell. 407. Although the case be stated to be of importance as relating to the boundary jurisdiction. It is irregular in a jury to take with them, on retiring to consider their verdict, docu-

Mistake or
misdirection
of the
Judge.

First, a new trial will be granted where the Judge has misdirected the jury upon a matter of law; as where he states to the jury that the evidence does not prove an alleged custom, when the testimony of the witnesses, if believed, does prove the custom (z).

So if the Judge reject evidence which ought to have been admitted, or admit that which ought to have been rejected (a).

Formerly the Courts would not grant a new trial on the ground of the reception of improper evidence, where there was sufficient evidence without it to warrant the verdict (b). But it has since been determined and seems now to be settled, that where evidence formally objected to at the trial is improperly received, the adverse party has a right to a new trial (c).

A new trial was refused to be granted on account of the rejection of a witness as incompetent, who was really competent, where the fact which he was called to prove was established by another witness, and was not disputed, and the verdict was founded on a collateral point, on which the defence was rested (d).

The Court will grant a new trial on the ground of misdirection

ments without leave of the Court; but if the document so taken be evidence on both sides, the taking it will not avoid the verdict. *R. v. Burdett*, Ld. Ray. 148. *Secus*, if it be evidence on one side only. *Lady Joy's case*, cited *ib.*; Bro. Verd. pl. 19. It is not enough, in order to set aside a verdict, to show that printed papers tending to create prejudice against a party, even in a criminal case, were circulated by strangers. *R. v. Burdett*, 1 Ld. Ray. 148.

(z) *How v. Strode*, 2 Wils. 260; 2 Salk. 649; 7 Mod. 64. So if that be left to the jury, as an award by commissioners having jurisdiction, which is in fact necessary evidence founded on the conduct and demeanor of the parties, and not an award or adjudication, the Court will grant a new trial. *Jarrett v. Leonard*, 2 M. & S. 265. The Court refused to grant a new trial on the ground of misdirection by an under-sheriff on a subject over which the jury had no power, viz. the amount of damages which would entitle the plaintiff to full costs. *Grater v. Collard*, 6 Dowl. P. C. 503. The Court granted a new trial in a toll cause, where the Judge had misdirected the jury as to the meaning of the term consuetudines, in an ancient

charter. *Earl of Egremont v. Saul*, 6 Ad. & Ell. 24.

(a) *Thomkins v. Hill*, 7 Mod. 64. Where no objection was made to the admissibility of evidence until the Judge commenced summing up, the Court afterwards refused a new trial on that ground. *Abbott v. Parson*, 7 Bing. 563.

(b) *Nathan v. Buckland*, 2 Moore, 153. *Horford v. Wilson*, 1 Taunt. 12. Even, as it seems, in a criminal case. *R. v. Ball*, Russ. & Ry. C. C. L. 132. *Tinkler's case*, *ib.* in the note; 1 East's P. C. 354. And see *R. v. Treble*, Russ. & Ry. C. C. L. 166. Where the Court saw that there was evidence *not merely enough* to warrant the finding of the jury, independently of that which was objected to as having been improperly received, but that it greatly preponderated in favour of the verdict, the Court refused a new trial. *Doe d. Lord Teynham v. Tyler*, 6 Bing. 561. But see below.

(c) By Ld. Denman, C. J., in *Wright v. Doe d. Tatham*, 7 Ad. & Ell. 330. S. P. *Crease v. Barrett*, 1 C. M. & R. 919, 5 Tyr. 458; and *De Rutzen v. Farr*, 4 Ad. & Ell. 53.

(d) *Edwards v. Evans*, 3 East, 451.

in a penal action after a verdict for the defendant (e), or although the sum recovered should be less than 20*l*.

If the plaintiff's counsel at the trial acquiesce in the ruling of the Judge, and in consequence the defendant takes a verdict without entering into his case, the plaintiff cannot afterwards move for a new trial on the ground of misdirection (f). And it rarely happens that the Court will grant a new trial upon a point of law which has not been taken at the trial (g); and in no case where the objection, if taken, might have been removed by evidence (h). The Court has refused to grant a new trial, to let the party into a defence of which he was apprised at the trial (i); as to give the defendant an opportunity of proving by way of defence the illegality of a policy of insurance (k). But where the defendant in an action on a policy failed to prove a breach of the Convoy Act, through the mistake of a witness who had failed in producing the necessary document from the Admiralty, the Court granted a new trial after a verdict for the plaintiff on the merits (l).

Misdirection, waiver of.

New trial not granted on an objection not taken at the trial.

The Courts do not interfere for the purpose of granting new trials, but in order to remedy some manifest abuse, or to correct some manifest error in law or fact. Where there is a contrariety of evidence the Court will not grant a new trial, unless it clearly appear that the jury have drawn an erroneous conclusion, even although there are circumstances in the case pregnant with suspicion, and which lead to a contrary conclusion, or although the verdict be contrary to the opinion and direction of the Judge who tried the cause (m).

Mistake or misunderstanding of the jury.

(e) *Wilson v. Rastall*, 4 T. R. 753.
Calcraft v. Gibbs, 5 T. R. 19; 3 T. R. 553.

(f) *Robinson v. Cook*, 6 Taunt. 336.

(g) *Ritchie v. Bousfield*, 7 Taunt. 309.
And see *Cox v. Kitchen*, 1 B. & P. 339, where the Court refused to set aside a verdict on a point of law not taken at the trial, where the justice and conscience of the case were with the verdict.

(h) *Malkin v. Vicherstaff*, 3 B. & A. 89. If, at the trial of a cause, the counsel on both sides argue on the effect of an instrument, as being in evidence, and it is by mistake never in fact produced; after verdict, the omission cannot be taken advantage of. *Doe v. Penry*, 1 Anst. 266.

(i) *Vernon v. Hankey*, 2 T. R. 113.

(k) *Gist v. Mason*, 1 T. R. 84.

(l) *D'Aguilar v. Tobin*, 2 Marsh. 265.

(m) *Carstairs v. Stein*, 4 M. & S. 192.

The question was, whether a commission of one half per cent. on a banking account was usurious; and the jury decided that, under the circumstances, it was not. And *Moore v. Taylor*, 1 Ad. & Ell. 25; where the question was, whether bricks, &c. were taken as cargo or as ballast. So where the sessions have found as a fact a contract of hiring for a year, the Court will not, if there be any premises from which that conclusion might be drawn, disturb that finding. Where, after the original hiring for less than a year, the pauper and her mistress varied the terms, from which it might be inferred that they contemplated that there should be a continuation of the service beyond the original period, the Court refused to disturb the decision of the

New trial.

Where a plaintiff is in conscience entitled to recover, the Courts will not grant a new trial, although he has obtained a verdict upon a presumption contrary to evidence (*n*), or upon a point of law not reserved on the trial (*o*).

It is matter of discretion with the Court, in *all* cases, whether they will grant a new trial for excessive damages (*p*). Where a plaintiff is entitled to recover for part of his demand, and is also entitled to recover the residue, but in a different form of action, the Court will not reduce the damages, a verdict having been obtained for the whole demand (*q*).

Where the verdict (under 20 *l.*) was against the opinion of the Judge and weight of evidence, the Court nevertheless refused a new trial without payment of costs (*r*).

A new trial will not be granted after a verdict for the defendant upon an indictment for a misdemeanor, on the ground that the verdict was against evidence (*s*); nor in a penal action (*t*).

A new trial has been granted on an affidavit made by a material witness that he made a mistake in his evidence (*u*).

It is a general rule that affidavits cannot be received from jurors to show on what grounds they acted (*x*). And although affidavits

sessions. *R. v. St. Andrew the Great, Cambridge*, 8 B. & C. 664.

In an action on an insurance policy against fire, one of the conditions was a forfeiture of all benefit in case of fraud or false swearing as to the amount of loss claimed: the plaintiff claimed and made an affidavit of damage to the extent of 1,085 *l.*, and having sued for the amount, the jury, upon very suspicious circumstances of fraud, gave only 500 *l.*; the Court, at the instance of the defendants, granted a new trial. *Levi v. Baillie*, 7 Bing. 349; and 5 M. & P. 208.

(*n*) *Wilkinson v. Payne*, 4 T. R. 468.

(*o*) *Cox v. Kitchen*, 1 B. & P. 338.

(*p*) *Ducker v. Wood*, 1 T. R. 277. *Jones v. Sparrow*, 5 T. R. 257. *Goldsmith v. Lord Sefton*, 3 Ans. 808. *Hewlett v. Crutchley*, 5 Taunt. 277. A new trial will not be granted, on this ground, in an action for crim. con., unless it appear that the jury acted under the influence of undue motives, or of error and misconception. *Duberly v. Gunning*, 4 T. R. 651. *Chambers v. Caulfield*, 6 East, 244. *Bennett v. Allcott*, 2 T. R. 166. Where, the defendant omitting to appear at the

trial, the jury had, in a case of great aggravation of crim. con., given more damages than were laid in the declaration, the Court refused a new trial on any terms. *Masters v. Barnwell*, 7 Bing. 224. The Court will sometimes direct the former verdict to stand as a security. *Pleydell v. Ld. Dorchester*, 7 T. R. 529.

(*q*) Per Abbott, C. J., *Mayfield v. Wadely*, 3 B. & C. 357.

(*r*) *Scott v. Watkinson*, 4 M. & P. 237.

(*s*) *R. v. Mann*, 4 M. & S. 337. *R. v. Reynell*, 6 East, 315. But, under special circumstances, the Court has suspended the entry of a judgment after an acquittal on an indictment for not repairing a highway. *R. v. Wandsworth*, 1 B. & A. 63.

(*t*) *Brooks v. Middleton*, 10 East, 268.

(*u*) *Richardson v. Fisher*, 1 Bingham. 145.

(*x*) Where the Judge, being of opinion that the plaintiff had made out no title, directed a verdict for the defendant; and the jury being present, and no objection made at the time of entering the verdict, the Court refused an application for a new trial on the affidavit of a juror that he had

may be admissible when made by jurors as to what is done openly in court, yet it was observed by the Court that the information had better be derived from some other source (y). The delivery of food to a retired jury, without showing that it was done by a party to the cause, or that the refreshment had the effect of carrying the verdict, is not a sufficient ground for setting aside the verdict (z).

The doctrine of nonsuits is founded on the ancient practice, according to which a plaintiff was bound by himself or his attorney to appear at the trial, prosecute his suit, and hear the verdict; and in case, after being called, he made default, he was decreed to have abandoned his suit, and was *nonsuited*. Practice as to nonsuits.

This ancient practice has long been used as the medium by which the Court intimates an opinion that the plaintiff has not made out a sufficient case for the consideration of the jury. The plaintiff is therefore formally called, although by himself or his counsel he has actually appeared in court. In conformity, however, with the old practice, being called, he may if he choose appear, and if he do, the case must go to the jury (a). On the other hand, the plaintiff may of his own accord and for his own convenience *elect* to be nonsuited at any time before the jury have delivered their verdict (b), and in that case, he cannot afterwards be heard upon an application to set aside the nonsuit (c).

Where an objection is taken in the nature of a demurrer to the plaintiff's evidence, that, even admitting it to be true, it is insufficient in point of law, if the Judge accede to the objection

not concurred in the verdict. *Saville v. Lord Farnham*, 2 M. & Ry. 216. And see *Everett v. Youells*, 4 B. & Ad. 681.

(y) *Everett v. Youells*, 4 B. & Ad. 681. But it was there held that the note of the Judge on such points is conclusive. Upon the trial of an information for a seditious libel, the jury, after having retired, upon their return into court in order to deliver their verdict, it was uncertain whether all of them were within hearing of what was declared by their foreman; the Court held, that the Judge properly refused to interfere after the verdict was recorded, or to act upon a communication from any of them; but under such uncertainty, the Court would allow the defendant a new trial, if he were disposed to apply for it. *R. v. Wooler*, 6 M. & S. 265.

(z) *Everett v. Youells*, 4 B. & Ad. 681.

(a) *Watkins v. Towers*, 2 T. R. 281. As the plaintiff cannot be nonsuited without consent, he may refuse to do so unless the defendant will consent to terms. *E. g.* that the Court alone shall have the same power as to amending a variance that the Court at Nisi Prius had.

(b) 3 Bing. 391.

(c) *Simpson v. Clayton*, 2 Bing. N. C. 467. As, if the plaintiff's counsel elect to be nonsuited on an intimation from the Court that he is entitled to nominal damages only. *Butler v. Dorant*, 3 Taunt. 229. So if he do so on the Judge's proposing to leave two questions to the jury, one of which is material, and of which there is *prima facie* evidence. *K. B. Trin. T. 1830*.

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to nonsuits.

the usual course is to nonsuit (*d*) the plaintiff. But in such case, if the objection be of a doubtful nature, it is usual for the Judge, either to nonsuit the plaintiff, with leave to move to set aside the nonsuit and enter a verdict for the plaintiff for a sum agreed on or ascertained by the jury, or to permit the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. This seems to be discretionary on the part of the Judge, who usually decides according to the weight of his own opinion for or against the objection.

A plaintiff after a nonsuit may move without any leave reserved to set aside the nonsuit; but in that case, although the nonsuit was improper, the Court will do no more than set aside the nonsuit (*e*). Upon such motion made without leave, if the nonsuit be not tenable on the objection urged at the trial, the Court will not support it on another ground which was not urged, unless the objection be of such a nature as to be incapable of removal (*f*). But a defendant cannot move to enter a nonsuit without leave; and even with leave he will be confined to the objections founded upon defects in evidence taken at the trial; for had the further objection been then taken, the plaintiff might possibly have answered it by adducing further evidence (*g*). Where the nonsuit is *in invitum*, the plaintiff may without leave move to set it aside, although he make no request at the trial that the case may be left to a jury (*h*), and submit merely out of deference to the Judge. The

(*d*) In an action of tort against several, there cannot be a nonsuit as to one and a verdict against the others. *Revett v. Browne*, 2 M. & P. 18.

The Court will not entertain an application for a nonsuit upon an objection taken at the trial, but not reserved by the Judge. *Matthews v. Smith*, 2 Y. & J. 426. Where two issues were found for the plaintiff and two for the defendant, with liberty reserved to the latter to move for a nonsuit if the Court should think the issues found for the plaintiff immaterial, which was acquiesced in at the trial by the plaintiff's counsel; held, that a nonsuit might be entered, notwithstanding the finding of some of the issues for the defendant. *Shepherd v. Bishop of Chester*, 6 Bing. 437. Where the Judge nonsuited upon the opening, and consequently there was no verdict; held, that he had no power to certify under the 6 Geo. 4, c. 50, to entitle the defendant to the costs of the

special jury. *Wood v. Grimwood*, 10 B. & C. 701.

A plaintiff may be nonsuited after payment of money into court. *Gutheridge v. Smith*, 2 H. B. 374. In replevin, although the cause is tried on the defendant's record. *Mann v. Lovejoy*, R. & M. 357. So where there is judgment by default against one of two defendants, and the other has pleaded. *Murphy v. Donlan*, 5 B. & C. 178. So on trial by proviso. *Anderson v. Shaw*, 3 Bing. 290.

(*e*) *Doe d. Lawrence v. Shawcross*, K. B. Hil. 1825.

(*f*) *Ib.* And see *Malkin v. Vickers*, 3 B. & A. 89.

(*g*) *Driver v. Thomson*, 4 Taunt. 294.

(*h*) *Alexander v. Barker*, 2 C. & J. 136. *Ward v. Mason*, 9 Price, 291. Garrow, *B. dissentiente*. But he cannot urge a ground of action which he did not urge at

plaintiff, with leave reserved at the trial, may move to have a nonsuit set aside, and a verdict entered for him. Such a reservation being made in open court, the tacit consent of the jury and defendant is to be implied (*i*). And this may be done even in an undefended cause (*k*). Leave is sometimes given to a defendant to move to set aside a verdict and enter a nonsuit. But this cannot be done without the plaintiff's consent; and, as the condition of such consent is that the case shall go to the jury (*l*), the defendant will not be entitled to have a nonsuit entered unless the jury give a verdict.

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to nonsuits.

The defendant cannot insist on a nonsuit after he has addressed the jury and examined witnesses (*m*). It has been held that a bill of exceptions lies if the Judge improperly nonsuit (*n*).

After an untenable verdict for the plaintiff, no liberty to enter a nonsuit having been reserved, the Court can only grant a new trial, for otherwise the defendant would be deprived of his right to tender a bill of exceptions (*o*).

Where the terms of a declaration are ambiguous, and taken in one sense will, but taken in another sense will not, support the verdict, and there is no evidence to support the allegation in the former sense, the proper course is (on leave given) to move to enter a nonsuit (*p*). A plaintiff in *assumpsit* may be nonsuited, although a co-defendant has let judgment go by default (*q*).

A verdict set aside in part, must be set aside for the whole (*r*).

The practice of advising the jury as to the nature, bearing, tendency and weight of the evidence, although it be a duty which from its very nature must be, in a great measure, discretionary on

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the trial. *Waller v. Drakeford*, 1 Starkie's C. 481.

(*i*) 2 B. & A. 797.

(*k*) 3 Bing. 291.

(*l*) *Dewar v. Purday*, 3 Ad. & Ell. 166.

(*m*) *Roberts v. Croft*, 7 C. & P. 376. A nonsuit for not giving material evidence within the county must be claimed at the trial. *How v. Pickard*, 2 M. & W. 373.

(*n*) *Strother v. Hutchinson*, 4 Bing. N. C. 83; yet the plaintiff may appear if he think proper.

(*o*) *Minchin v. Clement*, 1 B. & A. 252. And see *Hill v. Thompson*, 8 Taunt. 402.

(*p*) Where the terms used in a declaration founded on a penal clause in a statute are ambiguous, they will, after verdict be so construed as to sustain the verdict,

Lord Huntingtower v. Gardiner, 1 B. & C. 297. *Avery v. Hoole*, 2 Cowp. 825. And therefore where the declaration alleged in some counts the "giving money for voting," and there was no evidence of a previous agreement to give money, which was necessary to constitute the offence, the Court (leave having been reserved to move to enter a nonsuit) directed a nonsuit to be entered. For the declaration, to be sustainable, must be taken to import a previous agreement, and of that there was no evidence.

(*q*) *Murphy v. Donlan*, 5 B. & C. 178.

(*r*) *R. v. Phillips*, 1 Burr. 305. *Bernasconi v. Fairbrother*, 3 B. & Ad. 572. But see *Thwaites v. Lainsbury*, 6 C. & P. 60.

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the jury.

the part of the Judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law (*s*). The trial by jury is a system admirably adapted to the investigation of truth; but in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration.

A jury taken from the body of the community may well be presumed to be possessed of such knowledge and experience, derived from their intercourse with society, as will peculiarly fit them for the determination of all disputed facts arising out of the ordinary transactions of life. It must, however, be recollected, that jurors, unaccustomed as they usually are to judicial investigations, require, in complicated cases, all the aid which can be derived from the experience and penetration of the Judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion. The law, in its wisdom, ultimately relies upon their integrity and understanding, but nevertheless anxiously prepares the way for a correct conclusion, by excluding from their consideration all such evidence as is likely to embarrass, mislead or prejudice them in the course of their inquiry. So far the law proceeds by certain and definite rules. Much yet remains to be done of a nature which cannot be defined: to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connexion, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration which might otherwise embarrass or mislead; and to do this in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office (*t*). There is, perhaps, no instance in which the natural

(*s*) See Comm. 375. When the evidence is gone through on both sides, the Judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, omitting all superfluous circumstances; observing wherein the main question and principal issue lies; stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon the evidence.

(*t*) Notwithstanding the splendid ad-

vantages which in practice are known to emanate from this wise and venerable institution, it is not to be disguised, that in some, and those essential respects, it is liable to objections, from which an ordinary tribunal, constituted of professional Judges, would be more likely to be free. Jurors are liable to prejudice and bias, and even partiality, from local and personal connexion; their very prejudices in favour of right may frequently tempt them to put their oaths in peril, by their desire to act according to their own notions of justice,

and acquired powers of the mind are more strikingly and beneficially exerted than in a court of justice, where a confused mass of evidence relating to an intricate case is, by the effort of a vigorous, acute, and comprehensive mind, reduced into regularity and order.

On the discharge of this great duty the dearest interests of society, the very issues of life and death, frequently depend.

To offer any remarks on this head would be irrelevant, as well as presumptuous. Some observations will, under another division, be made upon the force and weight of evidence, and on the general principles which relate to that branch of the subject.

The law, to use an ordinary phrase, has no scales wherein to weigh different degrees of probability (*u*), still less to ascertain what weight of evidence shall amount to absolute proof of any disputed fact.

Province of juries to weigh probabilities.

Its business is to define, to distinguish, and to apply legal consequences to ascertained facts; but whether a fact be probable or improbable, true or false, admits of no legal definition or test. The principles on which the investigation and ascertainment of truth depend, are fixed and invariable, however the particular process prescribed by different systems of law for the purpose of investigation may vary.

As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced and intelligent mind than upon the application of artificial and technical rules, the law of England has delegated this important office to a jury of the country.

One great advantage derived from this venerable institution is, that this mode of trial excludes a number of technical and artificial rules and distinctions, which, but for the complete and absolute separation of law from fact, would be sure to arise. Were the decision of facts to be constantly referred to the same individual, the frequent occurrence of similar combinations of facts would tempt

when those are at variance with defined and general but wise rules of law: they act but casually; they have no professional character to sustain; they assign no reasons for their decisions; in effect they are not amenable for corrupt decisions; and it can rarely happen that their individual and personal characters are at stake. In many instances too they are ill suited, by their previous habits, to decide on the effect of legal instruments, and other matters in-

involved in and complicated with legal rules and presumptions. If such objections were not in practice to be counteracted by the discretionary aid, advice and guidance of the presiding Judge, and if the errors and mistakes of juries were not to be subject to revision and correction, it must be admitted by its warmest admirers that this mode of trial would frequently be precarious and unsatisfactory.

(*u*) *Infra*, note (*x*).

him to frame general and artificial rules, which, when they were applicable, would save mental exertion in particular instances; and perhaps a laudable wish to decide consistently, and that fondness for generalizing which is incident to every reflecting mind, would tend to the same point, and would lead to the introduction of refined and subtle distinctions. A juror, on the contrary, called on to discharge his duty but seldom, possesses neither inclination nor opportunity to generalize and refine; unfettered, therefore, by technicalities, he decides according to the natural weight and force of the evidence (*x*).

Juries, how
far limited
by law.

Although all questions of pure fact belong peculiarly to the province of a jury (*y*), who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected, that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the case of all legal presumptions resulting from particular facts. It will be proper, therefore, in the first place, briefly to inquire to what extent a jury is restrained by legal rules; and, in the next place, to make some general observations on the natural force and weight of evidence.

With a view to the first consideration, that is, how far the law itself interferes as to the force or measure of evidence, it is to be recollected, that except in the few instances where a jury determine by the actual evidence of their senses, all evidence is either, first, *direct*, that is, where witnesses state or depose to facts of which they have had actual knowledge: or secondly, it is *indirect*; and *indirect* evidence is either *artificial* or *natural*. *Artificial*, where the law, by arbitrary appointment, annexes to particular evidence a force or efficacy beyond that which naturally belongs to it; as in the case of records, which for the sake of public convenience are usually made final and conclusive evidence of the

(*x*) Beccaria, (sec. 14.) thus expresses himself:—Ma questa morale certezza di prove è più facile il sentirla che l'esattamente definirla. Perciò io credo ottima lege quella, che stabilisce assessori al giudice principale presi dalla sorte è non dalla scelta, per chè in questo caso è più sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Again he says, Io parlo di probabilità in materia di delitti, che par meritare pena debbono esser certi. Ma svanira il paradosso, per chi considera che rigorosamente la certezza morale non è che una probabilità, ma probabilità tale che è chiamato

certezza, perchè ogni uomo di buon senso vi acconsente necessariamente per una consuetudine, nata dalla necessità di agire ed anteriore ad ogni speculazione; la certezza che se richiede per accertare un uomo reo è dunque quella che determina ogni uomo nelle operazioni più importante della vita.

(*y*) As to the discharging of a jury, where they cannot agree, see *Morris v. Davies*, 3 C. & P. 427. There, on an issue out of Chancery in order to inform the conscience of the Chancellor, the jury could not agree, and the parties refusing to consent to discharge them, the Judge did so on his own responsibility.

facts recorded (z). So in all instances of legal presumptions, whether they be absolute and conclusive (a), like the *præsumptiones juris et de jure* of the Roman law, or, as the *præsumptiones juris*, be operative only until they be rebutted by proof to the contrary: or such artificial evidence may be of a *conventional* nature, as where parties by deed or other written agreement constitute the particular instrument to be the appropriate expositor of their intentions, and the legal memorial of the facts which it contains. In these and some other instances the law prescribes the extent to which the evidence shall operate; and in these and all other cases, where a rule of law intervenes, a jury is bound by that rule of law, even though it be in opposition to their own conclusion as to the truth of the fact drawn from all the circumstances. Or, secondly, the evidence is purely natural, where the jury decide according to the natural weight and effect of the circumstances, either by the aid of experience, where former experience supplies such natural presumptions, or by the aid of reason exercised upon the circumstances, or by the joint and united aid of experience and reason (b).

Juries, how far restrained by law.

(z) *Infra*, Vol. II. tit. PRESUMPTIONS.

(a) *Ibid.*

(b) Sir W. Blackstone, 3 Comm. 371, following the example of Lord Coke, classes all circumstantial evidence as *violent, probable, or light* presumptions; making no distinction between such inferences as result immediately in respect of some association pointed out by previous experience, and those which are derived by the aid of reason exercised upon the special circumstances. According to this classification, the presumption is *violent* where the circumstances necessarily attend the fact; *probable*, where the circumstances *usually* attend the fact; and *light* presumptions, or *rash* presumptions, are those which have no weight or validity at all. The last branch of the division seems to be wholly useless, for an inference of *no weight* is a mere unwarrantable *assumption*. The division of all circumstantial evidence into circumstances which necessarily or usually attend such facts, is one of a questionable nature, inasmuch as it tends to confound those inferences which are the pure result of experience with those which result either from reason alone, exercised upon the circumstances, or upon reason and ex-

perience jointly. It is very possible that circumstances may supply moral proof, although not one of them be such as either *necessarily* or even *usually* attends the fact; the inference may be entirely independent of associations founded on experience, and rest wholly upon the exclusive force and nature of particular circumstances. Thus, in an instance cited below, where a highway robber was struck on the face by the prosecutor with a key, and was identified by the complete impression which he bore on his face, the circumstance was conclusive, but it was neither a *necessary* nor an *usual* one, with reference to the fact to be proved.

It is remarkable, that the illustration cited by Sir W. Blackstone, and by him borrowed from C. B. Gilbert's Law of Evidence, (p. 100), is not an instance of presumptive evidence offered to a jury, in the sense in which Lord Coke used the terms *violenta præsumptio*, but one of a conclusive presumption, or estoppel in law. He says, "If a tenant, in answer to his landlord's demand for rent due Michaelmas 1754, produce an acquittance for rent due at a subsequent period, in full of all demands, then this induces so forcible a pre-

Juries
bound by
legal rules.

Juries are bound by all the rules and presumptions of law, as far as they apply: they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon record; and although they are not bound by estoppels, as the parties might have been had the matter of estoppel being pleaded, yet they are usually bound by legal estoppels which could not have been pleaded, and also by all such matters in the nature of estoppels as in point of law conclude the parties. They are bound to give the proper legal effect to all instruments established by competent evidence, and to notice all matters which are noticed by the Court; they are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause.

It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge (*c*); for it could not be known whether the verdict was according to or against the evidence (*d*): it is very possible that the private grounds of belief might not amount to legal evidence.

And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts it will be a ground of motion for a new trial (*e*). It some-

sumption of payment that *no proof shall be admitted to the contrary*;" and yet he previously says, "these are called presumptions, which are only to be relied upon *till the contrary be proved*." Besides this, an acquittance, even in full, is not conclusive unless it be under seal. See Vol. II. tit. RECEIPT; and then it operates, not as a circumstance or ground of presumption for the consideration of a jury, but as a legal estoppel. Lord Coke, in the passage from which the illustration is cited (Co. Litt. 373), was treating of legal presumptions, which are mere arbitrary and positive rules of law (see Vol. II. tit. PRESUMPTION), and not of presumptive or circumstantial evidence to be weighed by a jury. Lord Coke on the other hand, in illustration of his *violenta præsumptio*, states a case of pure circumstantial evidence, independent of previous experience of the connexion of the par-

ticular circumstances: "as if one be run through the body with a sword, in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house." For further observations on this subject, see Vol. II. tit. PRESUMPTION.

(*c*) Comm. 375; And. 321. In trover the jury found for the plaintiff, but accompanied their verdict by a statement in writing, that whether the goods were considered as a loan or gift, they ought to have been returned, this was held to be nothing more than a mere statement of private opinion. *Whittet v. Bradford*, 5 Sc. 711.

(*d*) Comm. 375; And. 321.

(*e*) And. 321. But a new trial would not be granted if the verdict was supported by the evidence which was legally given. *Ib.*

times happens that evidence which is admitted for one purpose may be no evidence for another purpose, and in such cases a jury is bound to apply the evidence so far only as it is legally applicable. Thus, if *A.* and *B.* be tried at the same time, a confession made by the one, but which criminales the other, ought not to operate with the jury against the latter.

When the jury find a general verdict they are bound to apply the law as delivered by the Court, in criminal as well as civil cases, and in the latter they must do so under peril of an attain.

Previous to the remarks which will be made on the force and weight of evidence, whether direct or circumstantial, it is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case.

Degrees of
evidence.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact.

The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt.

But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or *primâ facie* right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting

Mere pre-
ponder-
ance.

Mere preponderance.

a presumption of law. If a party claimed as devisee against the heir at law, full proof of the devise, with all its formalities, would be essential; circumstantial evidence, which merely showed it to be more probable that the testator had made a will in favour of the party claiming as devisee, than that he had not done so, would be insufficient. So were a devise to be fully established by one who claimed as devisee, it would not be sufficient to show a mere probability that the devisor had made a subsequent will, revoking the former (*f*). One who seeks to charge another with a debt, must do so by full and satisfactory proof; and on the other hand, where a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of satisfaction. Again, where the law raises a presumption in favour of the fact, the contrary must be fully proved, or at the least such facts must be proved as are sufficient to raise a contrary and stronger presumption. Thus the law presumes a man to be innocent of a crime until his guilt be proved; but if the fact be proved that *A.* killed *B.*, then the presumption of law which before was in favour of *A.* is now against him, and malice will be presumed, unless he can establish facts which justify or extenuate the act (*g*).

Primâ facie and conclusive evidence.

Another distinction to be observed upon is, between *primâ facie* and conclusive evidence: *primâ facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited by the jury, unless it be rebutted or the contrary proved; *conclusive* evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. All evidence is strong or weak by comparison: in civil cases slight evidence of right or title is sufficient, as against a stranger who possesses no colour of title. Thus the mere possession of goods by one who found them, is evidence of property as against a wrong-doer, in an action of trover (*h*). The occupation of land, however recent, will enable the occupier to maintain trespass against a stranger (*i*). So in a settlement case, proof that a remote ancestor of the pauper was settled in the appellant parish would be sufficient *primâ facie* evidence,* and would prevail, unless it were to be rebutted by proof of some later settlement. So a special custom in a particular manor may be proved by a single instance in which it has been acted upon (*k*). So a prescription

(*f*) *Harwood v. Goodright*, Cowp. 87.

(*h*) *Armory v. Delamirie*, Str. 505.

(*i*) *Catteris v. Cooper*, 4 Taunt. 547.

(*g*) Vol. II. tit. MURDER.

(*k*) See tit. CUSTOM.

may in some instances be supported by proof of user for twenty years. On the other hand, in criminal cases, it is essential that the evidence should be of a *conclusive* nature. But here it is to be observed, that it very frequently happens in criminal as well as civil proceedings, that evidence which in itself is but inconclusive, derives a conclusive quality from mere defect of proof on the part of the adversary or accused.

Where a party, being apprised of the evidence to be adduced against him, has the means of explanation or refutation in his power if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true, or the claim well founded. It would be contrary to all experience of human nature and conduct, to come to any other conclusion.

Evidence to be weighed by a jury consists either in, 1st, the direct testimony of witnesses; or 2dly, indirect or circumstantial evidence (*l*); or 3dly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict. *First*, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon, 1st, their honesty; 2dly, their ability; 3dly, their number, and the consistency of their testimony; 4thly, the conformity of their testimony with experience; and 5thly, the coincidence of their testimony with collateral circumstances.

Direct evidence.

First, their *integrity*: A witness, to be faith-worthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath, and under the peril of the temporal inflictions due to perjury, will speak the truth.

Integrity of witnesses.

Although general and peremptory rules of law absolutely exclude persons actually convicted of infamous crimes (*m*), and such as have a certain legal interest in the event of the suit, or in the record (*n*), yet the credit of a witness not actually excluded is always for the consideration of the jury.

(*l*) Such indirect evidence corresponds with the *signa* of the Roman law, and with the *σημεία* or *τεκμήρια* of the Greeks, and supplied principally the materials of the *artificialis probatio* of the Roman lawyers. Argument, according to Quinctilian, is defined to be "*ratio probationem*

præstans quâ colligitur aliud per aliud, et quæ quod est dubium per id quod dubium non est confirmat."—See Glassford's Essay on the Principles of Evidence, 503.

(*m*) *Supra*, tit. WITNESS.

(*n*) *Ib.*

Integrity of
witnesses.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation; for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind; and hence it is for the jury to consider, whether the apparent want of motive to deceive be sufficient to accredit an exceptionable witness, and whether some assurance of the actual absence of such a motive be not necessary to warrant their confidence. A jury may, no doubt, in a criminal case, convict on the testimony of an accomplice, but then it is expected that the tainted credit of the witness should be supported by circumstances confirmatory of his testimony in material points; so that in practice such a witness is considered to be, not incompetent, but incredible, unless his testimony and his character be supported by undoubted facts and unexceptionable witnesses.

Influence.

It frequently happens that a witness labours under some influence arising from natural affection, near connexion, or mere expectation of contingent benefit or evil, which may afford a much stronger temptation to perjury than that which would arise from many defined and vested legal interests, which yet would have absolutely excluded his testimony. This is a necessary consequence resulting from the consideration that the law must operate by means of certain definite and peremptory rules, and the great mischief and inconvenience which would result from laying down rules too wide and exclusive in their operation. When, therefore, the peremptory rules of law cease to operate, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he be the witness of truth (o).

(o) The Roman law, *De testibus*, provides thus: "Testium fides diligenter examinanda est. Ideoque in *personâ* eorum exploranda erunt imprimis conditio cuiusque; utrum quis decurio an plebeius sit, vero et an honestæ et inculpatae vitæ, an notatus quis et reprehensibilis; an locuples vel egens sit ut *lucri causâ* quid

facile admittat; vel an inimicus ei sit versus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspicione testimonium, vel propter personam a quâ fertur quod honesta sit, vel propter causam quod neque *lucri* neque *gratiæ* neque inimicitiae causâ sit, admittendum."

In arriving at this conclusion, a consideration of the demeanour of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself (*p*). An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time (*q*) to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *vinâ voce* examination, of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth; they not un-

(*p*) Sir W. Blackstone, 3 Comm. 373, observes, "In short, by this method of examination, and this only the persons, who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points, all persons must appear alike when their depositions are reduced to writing, and read to the Judge in the absence of those who made them, and yet as much may be frequently collected from the manner in which the evidence is delivered as the matter of it."

(*q*) Mr. Evans (2 Pothier, 258,) observes that "a Welsh witness, who intends to give unfair testimony, always affects an ignorance of the English language; in consequence of which, the effect of cross-examination is not only weakened by the

intervention of an interpreter, but the witness has time to collect and prepare his answer. An ignorant witness will, however, frequently express himself with doubt and hesitation, out of mere awkwardness, or from superabundant caution, especially if he imagine that there is any design to entrap him into expressions contrary to his real meaning.

"This kind of hesitation is very general with such persons when plied with questions of an hypothetical nature, and when the answer is not so much an act of testimony as of reasoning; such as, *If it had been so, must you not have recollected, &c.* Where proof is actually given of a fact which a witness could not but know and recollect, his expressing himself with doubt and uncertainty is to be regarded as an act of wilful misrepresentation."

frequently supply the only true test by which the real characters of the witnesses can be appreciated (*r*).

Ability of
witnesses.

Secondly, their *ability*: The ability of a witness to speak the truth must of course depend on the opportunities which he has had of observing the fact (*s*), the accuracy of his powers of discerning (*l*), and the faithfulness of his memory in retaining the facts once observed and known.

Where a witness testifies to a fact which is wholly or partially the result of reason exercised upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance for the purpose of ascertaining whether his conclusion was a correct one.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact: thus where a witness is called to state that another witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject-matter of frequent experience, his reasons are of little weight; he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the fact and its circumstances, is strengthened and confirmed by the consideration that they were of such a nature as were likely to attract his attention. On the other hand, it is diminished by the consideration that the transaction was remote, and such as was not likely to excite notice and observation (*u*)

(*r*) Tu magis scire potes quanta fides habenda sit testibus que et cujus dignitatis et quantæ æstimationis sunt et qui simpliciter visi sunt dicere, utrum unum eundemque meditatam sermonem attulerint an ad ea quæ interrogaveras ex tempore verisimilia responderint." Adrian's Epistle to Varus, legate of Cilicia. Ff. 22; 5. 3.

(*s*) When the guilt of the prisoner depends *wholly* on proof of identity, it is impossible to inquire too minutely into the means and opportunity which the witnesses had of observing the person, so as to be able to speak with certainty. Many instances have occurred in which well-intentioned witnesses have sworn positively in this respect, and yet have been mistaken. I have frequently heard Mr. J. Bayley observe to juries, that fear has a very dif-

ferent effect upon different persons; in some it prevents the clear perception, whilst in other instances it assists in making an indelible impression.

(*t*) See Gil. L. Ev. 151, 2d ed.

(*u*) C. B. Gilbert, in his Law of Evidence, 151, 2d edit., says, "another thing that would render his (a single witness's) testimony doubtful, is the not giving the reasons and causes of his knowledge;" and again, "the same may be said as to persons who take upon them to remember things long since transacted, for if the matter be frivolous they ought to tell the causes of their memory, otherwise the memory is little to be accredited; for they are rather to be supposed as rash persons who take upon them to swear what they do not perfectly remember, than that they are really

Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time. Every man's experience teaches him how fallible and treacherous the human memory in such cases is. In its freedom from this defect consists one great excellence of documentary evidence, and its main superiority over that which is merely oral; and on this principle it is, that the law, out of policy, frequently deems mere oral evidence to be too weak, and requires a written voucher to prove the fact (*x*).

Ability of witnesses.

Of all kinds of evidence, that of extra-judicial and casual declarations is the weakest and most unsatisfactory; such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated (*y*).

A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a colouring to what has been said.

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in evi-

under the awe and conscience of an oath; for there they would be able to tell the reason and certain marks of their remembrance."

(*x*) See the Statute of Frauds, &c. On this ground, also, it is that mere words will not constitute an overt act of treason.

(*y*) Finalmente è quasi nulla la credibilità del testimonio, quando si faccia delle parole un delitto, poichè il tuono, il gesto, tutto ciò che precede, e ciò che siegue, le differenti idee, che gli uomini attaccano alle stesse parole, alterano, e modificano in maniera i detti di un uomo, che è quasi impossibile, il ripeterle, quali precisamente furon dette. Di più le azioni violenti, e fuori dell'uso ordinario, quali sono i veri delitti, lascian traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, ma le parole non rimangono che nella memoria per l'ò più infidele e spesso sedotta dagli ascoltanti. Egli è adunque di gran lunga più facile una alunnia sulle parole, che sulle azioni di un uomo, poichè di queste quanto maggior

numero di circostanze si adducono in prova, tanto maggiori mezzi si somministrano al reo per giustificarsi. Beccaria, sec. 13.

I once heard a learned Judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, "I am the drawer, the acceptor, and the indorser of the bill:" whilst the learned Judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was, that the prisoner had said, "I know the drawer, the acceptor, and the indorser of the bill." Had the witness, and not the Judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted. See the observation of Park, J., as to the caution with which such evidence ought to be received, B. & P. 542; and those of Mr. J. Foster, in his Treatise on the Law of Treason.

dence, which were used at a remote distance of time, or to which the attention of the witnesses was not particularly called, or where misconception was likely to arise from their situation and the circumstances under which they were placed, or from the prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause (*z*).

Such evidence is fabricated easily, contradicted with difficulty. In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. Evidence of this nature is of the very weakest kind, where it is doubtful whether the party making the admission knew his legal rights and situation (*u*).

Number of
witnesses.

Thirdly, *their number and consistency*: The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch.

It has been alleged (*b*) that two witnesses are essential to convict a man of a crime; for if there be but one, it is no more than the assertion of one man against that of another.

It is not easy to comprehend how the mere denial of guilt by an accused person, whose life may depend upon the credit attached to that denial, is to be placed in competition with the testimony of a witness examined upon oath. According to this species of logic, if six men were to commit a crime, it would require the testimony of at least seven witnesses to convict them upon their joint trial (*c*).

(*z*) The admitting evidence of loose conversations to revive an antiquated debt which would otherwise have been barred by lapse of time, has nearly had the effect of overturning the provisions of a most wholesome statute. See the observations of the Court, 4 B. & A. 571.

(*a*) As where, in a settlement case, the declaration of an inhabitant is given in evidence; or a party makes admissions involving matter of law as well as matter of fact; as in reference to marriage. See Vol. II. tit. POLYGAMY. MARRIAGE. Or a discharge under an insolvent Act. *Summerset v. Adamson*, 1 Bing. 73.

(*b*) Montesquieu, Sp. of Law, b. 12, c. 3.

(*c*) The civil law requires proof by two

witnesses, according to its universal maxim, "*Unius responsio testis omnino non audiat*." Sir W. Blackstone observes, 3 Comm. 370, that to extricate itself out of this absurdity, the practice of the Civil-law Courts has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one *semiplena probatio* only, on which no sentence can be founded: to make up, therefore, the necessary complement of witnesses, where they have one only to a single fact, they permit the party himself, plaintiff or defendant, to be examined on his own behalf, and administer to him which is called the suppletory oath; and if his oath happen to be in his own favour,

But although the testimony of a single witness, whose credit is untainted, be sufficient to warrant a conviction, even in a criminal case, yet undoubtedly any additional and concurrent testimony adds greatly to the credibility of testimony, in all cases where it labours under doubt or suspicion; for then an opportunity is afforded of comparing the testimony of the witnesses on minute and collateral points, on which, if they were the witnesses of truth, their testimony would agree, but if they were false witnesses, would be likely to differ (*d*).

Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken, or wilfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions; either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established (*e*).

Consistency of testimony.

this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had, and to avoid all temptations of perjury, lays it down as an invariable rule that "*nemo testis esse debet in propria causâ*." The instances of perjury and treason are exceptions to the

rule: the former, upon grounds of strict principle, for there the oath of one witness is opposed to the oath of another witness; and in the latter, as a mere rule of policy devised for protecting the liberty of the subject.

(*d*) *Quia a cordato iudice mendacia testimonium deprehendi possunt si diversi interrogantur cum contra unus facile sibi constare possit.* Puffendorf, 568.

(*e*) See *Ld. Mansfield's* remarks in *R.*

So far does this principle extend, that in many cases, except for the purpose of repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

Effect of
inconsistency.

The considerations which tend to negative any suspicion of concert and collusion between the witnesses, are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject-matter of litigation; or they arise internally, from a minute and critical examination and comparison of the testimony itself.

The *nature* of such coincidences is most important: are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration: human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited: the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear of detection, and thus their testimony will not be even and consistent throughout: but the witnesses of truth will be equally ready and equally copious upon all points.

Partial
variances.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory

v. Genge, Cowp. 16. "It is objected that these books are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case

in the same way, it is demonstrative of the truth of what they report, or they could not agree."

It has been well remarked by a great observer (f), that "the usual character of human testimony is substantial truth under circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory.

It would, theoretically speaking, be improper to omit to observe that the weight and force of the united testimony of numbers, upon Aggregate force.

(f) "I know not (says Dr. Paley) a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the Judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom also absolute and final contradictions; yet neither the one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudius's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both cotemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history

supplies examples of the same kind: in the account of the Marquis of Argyle's death, in the reign of Charles the Second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day: on the contrary, Burnet, Woodrow, Heath and Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?"

It may not perhaps be deemed irrelevant to mention a circuit anecdote in illustration of the foregoing observations. Not long before the death of Mr. Justice Le Blanc, and whilst he was presiding as one of the Judges of assize at Lancaster, he had a fainting fit. Some time afterwards, the circumstance being the topic of conversation amongst a considerable number of the members of the bar who had been present, a doubt was started, whether the fact had taken place in the ordinary Civil Court or in the Crown Court, in which civil causes were usually tried after the termination of the business on the Crown side; and those who had been actual spectators were divided as to their recollection in which of the two courts the circumstance had occurred, many asserting that it took place in the one court, and nearly as many that it occurred in the other court.

abstract mathematical principles, increases in a higher ratio than that of the mere numbers of such witnesses.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favour of their united testimony would be obtained, not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of little practical importance. The maxim of law is *ponderantur testes non numerantur*. No definite degrees of probability can in practice be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connexion with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

In some instances, nevertheless, where from paucity of circumstances, the usual means of judging of the credit due to conflicting witnesses fail, it is possible that the abstract principles adverted to may operate by way of approximation, especially in those cases where the decision is to depend upon the mere preponderance of evidence.

Conformity
with expe-
rience.

Fourthly, the *conformity* of their testimony with experience : As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance stated by Mr. Locke (*g*), that is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult.

In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved; for

(*g*) Vol. II. p. 276. "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather, that it would bear an elephant if he were there. The king replied, Hitherto

I have believed the strange things you have told me, because I looked upon you as a sober fair man, but now I am sure you lie."

it might be more probable in the particular instance that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence, and situation of the witnesses, and the collateral circumstances which tend to confirm their statement (*h*). In ordinary cases, where a witness stands wholly unim-

(*h*) In observing upon the general principles on which the credibility of human testimony rests, it may not be irrelevant to advert to the summary positions on this subject advanced by Mr. Hume. He says, in his Essay, vol. 2, sec. 10, "A miracle is a violation of the laws of nature; and as a firm and unalterable experience has established these laws, the proof against a miracle, from the very nature of the fact, is as entire as any argument from experience can possibly be imagined." As a matter of abstract philosophical consideration (for in that point of view only can the subject be adverted to in a work like this), Mr. Hume's reasoning appears to be altogether untenable. In the first place, the very basis of his inference is that faith in human testimony is founded solely upon *experience*; this is by no means the fact; the credibility of testimony frequently depends upon the exercise of reason, on the effect of *coincidences in testimony*, which, if collusion be excluded, cannot be accounted for but upon the supposition that the testimony of concurring witnesses is true; so much so, that their individual character for veracity is frequently but of secondary importance, *supra*, 551. Its credibility also greatly depends upon confirmation by collateral circumstances, and on analogies supplied by the aid of reason as well as of mere experience. But even admitting experience to be the basis, even the *sole* basis, of such belief, the position built upon it is unwarrantable, and it is fallacious, for if adopted it would lead to error. The position is, that human testimony, the force of which rests upon experience, is inadequate to prove a violation of the laws of nature, which are esta-

blished by firm and unalterable experience. The very essence of the argument is, that the force of human testimony (the efficacy of which in the abstract is admitted) is *destroyed* by an opposite, conflicting and superior force, derived also from experience. If this were so, the argument would be invincible; but the question is, whether mere previous *inexperience* of an event testified is directly opposed to human testimony, so that mere experience as strongly proves that the thing is *not* as previous experience of the credibility of human testimony proves that it *is*. Now a miracle, or violation of the laws of nature, can mean nothing more than an event or effect never observed before, and to the production of which the known laws of nature are inadequate; and on the other hand, an event or effect in nature never observed before is a violation of the laws of nature: Thus, to take Mr. Hume's own example, "it is a miracle that a dead man should come to life, because that *has never been observed* in any age or country:" precisely in the same sense, the production of a new metal from potash, by means of a powerful and newly-discovered agent in nature, and the first observed descent of meteoric stones, were violations of the laws of nature; they were events which had never before been observed, and to the production of which the known laws of nature were inadequate. But none of these events can, with the least propriety be said to be *against* or *contrary* to the laws of nature, in any other sense than that they have never before been observed, and that the laws of nature, as far as they were previously known, were inadequate to their production. The proposition of Mr. Hume

peached by any extrinsic circumstances, credit ought to be given to his testimony, unless it be so grossly improbable as to satisfy

ought then to be stated thus : human testimony is founded on experience, and is therefore inadequate to prove that of which there has been no previous experience. Now whether it be plain and self-evident that the mere negation of experience of a particular fact necessarily destroys all faith in the testimony of those who assert the fact to be true ; or whether, on the other hand, this be not to confound the *principle* of belief with the *subject-matter* to which it is to be applied, and whether it be not plainly contrary to reason to infer the *destruction* of an active principle of belief from the mere *negation of experience*, which is perfectly consistent with the just operation of that principle ; whether, in short, this be not to assume broadly that mere inexperience on the one hand is necessarily superior to positive experience on the other, must be left to every man's understanding to decide. The inferiority of mere negative evidence to that which is direct and positive, is, it will be seen, a consideration daily acted upon in judicial investigations. Negative evidence is, in the abstract, inferior to positive, because the negative is not directly opposed to the positive testimony ; both may be true. Must not this consideration also operate where there is mere inexperience, on the one hand, of an event in nature, and positive testimony of the fact on the other ? Again, what are the laws of nature, established by firm and unalterable experience ? That there may be, and are, general and even *unalterable* laws of providence and nature, may readily be admitted ; but that *human knowledge and experience* of those laws is unalterable (which alone can be the test of exclusion) is untrue, except in a very limited sense ; that is, it may fairly be assumed that a law of nature once known to operate, will always operate in a similar manner, unless its operation be impeded or counteracted by a new and contrary cause. In a larger sense, the laws of nature are continually alterable : as experiments are more frequent, more perfect, and as new phenomena are observed, and new causes or agents are dis-

covered, human experience of the laws of nature becomes more general and more perfect. How much more extended and perfect, for instance, are the laws which regulate chemical attractions and affinities than they were two centuries ago ! And it is probable that in future ages experience of the laws of nature will be more perfect than it is at present ; it is, in short, impossible to define to what extent such knowledge may be carried, or whether, ultimately, the whole may not be resolvable into principles admitting of no other explanation than that they result immediately from the will of a superior Being. This at all events is certain, that the laws of nature, as inferred by the aid of experience, have from time to time, by the aid of experience, been rendered more general and more perfect. Experience, then, so far from pointing out any unalterable laws of nature, to the exclusion of events or phenomena which have never before been experienced, and which cannot be accounted for by the laws already observed, shows the very contrary, and proves that such new events or phenomena may become the foundation of more enlarged, more general, and therefore more perfect laws. But whose experience is to be the test ? That of the objector ; for the very nature of the objection excludes all light from the experience of the rest of mankind. The credibility, then, of human testimony is to depend not on any intrinsic or collateral considerations which can give credit to testimony, but upon the casual and previous knowledge of the person to whom the testimony is offered ; in other words, it is plain that a man's scepticism must bear a direct proportion to his ignorance. Again, if Mr. Hume's inference be just, the consequences to which it leads cannot be erroneous ; on the other hand, if it lead to error, the inference must be fallacious. The position is, that human testimony is inadequate to prove that which has never been observed before ; and this, by proving far too much for the author's purpose, is *felo de se*, and in effect proves nothing : for if constant inexperience amount to stronger evidence

the jury that he is not to be trusted. Thus, notwithstanding the general presumption of law in favour of innocence, a defendant may be convicted of a heinous and even improbable crime upon the testimony of a single witness.

on the one side than is supplied by positive testimony on the other, the argument applies necessarily to all cases where mere constant inexperience on the one hand is opposed to positive testimony on the other. According, then, to this argument, every philosopher was bound to reject the testimony of witnesses that they had seen the descent of meteoric stones, and even acted contrary to sound reason in attempting to account for a fact disproved by constant inexperience, and would have been equally foolish in giving credit to a chemist that he had produced a metal from potash by means of a galvanic battery. It will not, I apprehend, be doubted, that in these and similar instances the effect of Mr. Hume's argument would have been to exclude testimony which was true, and to induce false conclusions; the principle, therefore, on which it is founded, must of necessity be fallacious. Nay, further, if the testimony of others is to be rejected, however unlikely they were either to deceive or be deceived, on the mere ground of inexperience of the fact testified, the same argument might be urged even to the extravagant length of excluding the authority of a man's own senses; for it might be said, that it is more probable that he should have laboured under some mental delusion, than that a fact should have happened contrary to constant experience of the course of nature.

In stating that the inference attempted to be drawn from mere inexperience is fallacious, I mean not to assert that the absence of previous experience of a particular fact or phenomenon is not of the highest importance to be weighed as a circumstance in all investigations, whether they be physical, judicial, or historical: the more remote the subject of testimony is from our own knowledge and experience, the stronger ought the evidence to be to warrant our assent. Neither is it meant to deny that in particular instances, and under particular circumstances, the want or

absence of previous experience may not be too strong for positive testimony, especially where it otherwise labours under suspicion. What is meant is this, that mere inexperience, however constant, is not in itself, and in the abstract, and without consideration of all the internal and external probabilities in favour of human testimony, sufficient to defeat and to destroy it, so as to supersede the necessity of investigation. Mr. Hume's conclusion is highly objectionable in a philosophical point of view, inasmuch as it would leave phenomena of the most remarkable nature wholly unexplained, and would operate to the utter exclusion of all inquiry. Estoppels are odious, even in judicial investigations, because they tend to exclude the truth; in metaphysics they are intolerable. So conscious was Mr. Hume himself of the weakness of his general and sweeping position, that in the second part of his 10th section he limits his inference in these remarkable terms, "I beg the limitations here made may be remarked, when I say that a miracle can never be proved so as to be the foundation of a system of religion; for I own that otherwise there *may possibly* be miracles or violations of the usual course of nature of such a kind as to admit of proof from human testimony."

In what way the use to be made of a fact when proved can affect the validity of the proof, or how it can be that a fact *proved* to be true is not true for all purposes to which it is relevant, I pretend not to understand. Whether a miracle, when proved may be the foundation of a system of religion, is foreign to the present discussion; but when it is once admitted that a miracle *may be proved by human testimony*, it necessarily follows, from Mr. Hume's own concession, that his general position is untenable; for that, if true, goes to the full extent of proving that human testimony is *inadequate* to the proof of a miracle, or violation of the laws of nature.

As experience shows that events frequently occur which would antecedently have been considered most improbable, from their inconsistency with ordinary experience, and as their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there was no room for mistake.

Conformity
with cir-
cum-
stances.

Fifthly, Conformity with collateral circumstances : Direct testimony is not only capable of being strengthened or weakened to an indefinite extent by its conformity on the one hand, or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence. These positions lead immediately to an inquiry into the nature and force of indirect or circumstantial evidence.

Circum-
stantial
evidence.

Circumstantial, or, as it is frequently termed, presumptive evidence, is any which is not direct and positive (i).

An inference or conclusion from circumstantial or presumptive evidence, may be either the pure result of previous experience of the ordinary or necessary connexion between the known or admitted facts and the fact inferred ; or of reason exercised upon the facts ; or of both reason and experience conjointly. And hence such an inference or conclusion differs from a presumption, although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense ; for a presumption in strictness is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connexion between the known and inferred facts, and independently of any process of reason in the particular instance (k).

The consideration of the nature of circumstantial evidence, and of the principles on which it is founded, merits the most profound attention. It is essential to the well-being, at least, if not to the very existence of civil society, that it should be understood, that the secrecy with which crimes are committed will not ensure impunity to the offender. At the same time it is to be emphatically remarked, that in no case, and upon no principle, can the policy of preventing crimes, and protecting society, warrant any inference which is not founded on the most full and certain conviction of the truth of the fact, independently of the nature of the

(i) For a more copious statement of the principles on which the force of circumstantial evidence depends, illustrated by numerous cases, the reader is referred to

a very interesting book, intituled "An Essay on the Rationale of Circumstantial Evidence," by Mr. Wills.

(k) Vide Vol. II. *THE PRESUMPTIONS*.

offence, and of all extrinsic considerations whatsoever. Circumstantial evidence is allowed to prevail to the conviction of an offender, not because it is necessary and politic that it should be resorted to (*l*), but because it is in its own nature capable of producing the highest degree of moral certainty in its application. Fortunately for the interests of society, crimes, especially those of great enormity and violence, can rarely be committed without affording vestiges by which the offender may be traced and ascertained (*m*): The very measures which he adopts for his security not unfrequently turn out to be the most cogent arguments of guilt. On the other hand, it is to be recollected that this is a species of evidence which requires the utmost degree of caution and vigilance in its application, and in acting upon it, the just and humane rule impressed by Lord Hale (*n*) cannot be too often repeated: "*tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.*"

By circumstantial or presumptive proof is meant that measure and degree of circumstantial evidence which is sufficient to pro-

Grounds of circumstantial proof.

(*l*) It is almost superfluous to remark upon the absurd and mischievous doctrine, that the nature of the crime ought at all to influence the measure of proof, and that, out of policy, slighter proof is sufficient in proportion to the atrocity of the offence, according to the pernicious maxim, *in atrocissimis leviores conjecturæ sufficiunt et licet judici jura transgredi*. Where any doubt exists as to the *corpus delicti*, whether any crime has been committed, the very reverse of the above position is true; the more atrocious the nature of a crime is, the more repugnant it is to the common feelings of human nature, the more improbable it is that it has been perpetrated at all. "La credibilità di un testimonio diviene tanto sensibilmente minore quanto più cresce l'atrocità di un delitto e l'inverisimiglianza delle circostanze; tali sono per esempio la magia, è le azioni gratuitamente crudeli." Beccaria, s. 13. But when it has once been clearly established that a heinous crime has been perpetrated, and the only question is as to the perpetrator, it is manifest that the atrocity of the crime in the abstract raises no probability either for or against the accused, although

under particular circumstances it may be a matter of great importance.

Thus on a charge of infanticide, where there is a doubt whether the child was destroyed by design, or by accident during a secret delivery, the very atrocity of the offence raises a strong degree of probability in favour of the latter conclusion. On the other hand, were it clear from the circumstances under which a body was found, that the party had been murdered, then the *corpus delicti* being established, the atrocity of the offence would in the abstract raise no probability either in favour of or against any individual; but if in the particular instance the question were, whether the son of the deceased, or a stranger, was the guilty agent, then a probability from the particular circumstances would operate in favour of the son. It would, without reference to circumstances, be more probable that a stranger had committed the heinous crime of murder, than that a son had committed that horrible offence upon the person of his own father.

(*m*) See the observations of Beccaria, *supra*, 549.

(*n*) Hale, 290.

Grounds of
circum-
stantial
proof.

duce conviction in the minds of the jury of the truth of the fact in question.

To the validity of every such proof it is essential, first that a basis of facts be established by sufficient evidence; and in the next place, that the proper conclusion should be deduced, by the aid of reason and experience, from those facts and circumstances so established.

The force and tendency of circumstantial evidence to produce conviction and belief depend upon a consideration of the coincidence of circumstances with the fact to be inferred, that is, with the hypothesis, and the adequacy of such coincidences to exclude every other hypothesis (o).

All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties. No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist. It is therefore a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and these so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely and metaphysically, impossible,

(o) In one respect, proof by circumstantial evidence is analogous to the indirect proof, or *reductio ad absurdum*, in geometry: in each case the truth of the proposition is attained to by negating and excluding the truth of any other hypothesis; in the one case to a metaphysical and absolute, in the other to a moral certainty. In another and essential point they usually differ: in the geomet-

rical proof the exclusion of *one* other hypothesis frequently excludes *all* others, and thus at once establishes the truth of the proposition; in the case of moral circumstantial proofs it may not only be necessary to exclude several different hypotheses by as many different processes of reasoning, but a doubt may still exist whether some other hypothesis may not remain unanswered.

the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for if that fact really existed, it was necessarily consistent with all the circumstances.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as absolutely and demonstratively to exclude any other. If, for instance, it were to be proved, that *A. B.* entered a room containing a watch, and that the watch was gone upon his departure, and it were also proved that no agent but *A. B.* in the interval had had access to the room, the proof that *A. B.* took the watch would be conclusive and complete; for the supposition that it had been removed by any other agent would be entirely excluded.

Coincidence between the facts and the hypothesis.

Force of.

In the next place, the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it be not, as in the former case, of an absolute and demonstrative nature. The probability of the hypothesis must always be proportioned to the *nature, extent* and *number* of its coincidences with the circumstances proved (*p*).

(*p*) All theories which explain the connexion between natural phenomena and their causes are of this description. They consist in showing the existence and operation of a cause, and its adequacy to explain the phenomena; in other words, their coincidence with the hypothesis. Evidence, therefore, of the truth of any such theory is in no case demonstrative, although it reach to the highest degree of moral certainty. The most splendid, important, and beautiful of all philosophical theories, that of Sir Isaac Newton, for explaining the solar system, as exhibited by that great philosopher, amounts simply to this: a cause, viz. gravitation, exists. It is matter of demonstrative proof, that if such a cause did really operate upon the system, it would produce all the effects or phenomena which are actually observed; that is, the supposed cause is sufficient to explain all the phenomena. Hence it is inferred to be true, and the force of this inference is in proportion to the improbability

that all the minute coincidences between the phenomena and the hypothesis should be merely fortuitous, and that they should have resulted, not from a cause known to exist, and which is adequate to produce them, but from some other cause unobserved and unknown. To a certain extent, philosophical proofs as to the relations of cause and effect in the natural world, are similar to circumstantial judicial proofs; in each case the basis of proof consists in the coincidences proved to exist between the phenomena or circumstances and the hypothesis. Beyond this point, and with respect to the effect of such coincidences, they frequently differ essentially. The philosophical proof rests on mere coincidences, indefinite in point of number, and the absence of any other cause adequate to account for the phenomena; but the agency of some other, but unknown, cause can never be absolutely excluded. On the other hand, although circumstantial proof must rest on a limited number of coinci-

Coincidence between the circumstances and the hypothesis.

Connexions and coincidences between the circumstances and the hypothesis which they tend to prove, are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of robbery, and stains of blood upon the person, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited. Happy it is for the interests of society that forcible injuries can seldom be perpetrated without leaving many and plain vestiges by which the guilty agent may be traced and detected. Instances of this nature, where apparently slight and unexpected circumstances have led to the detection of offenders, are familiar to all who are concerned in the practical administration of justice. In a case of burglary the thief had gained admittance to the house by opening a window by means of a penknife, which was broken in the attempt, and part was left in the wooden frame: the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left. A murder had been committed by shooting the deceased with a pistol, and the prisoner was connected with the transaction by proof that the wadding of the pistol was part of a letter belonging to the prisoner, the remainder of which was found upon his person (g). In another case of murder, one of the circumstances to prove the prisoner to have been the criminal agent was the correspondence of a patch on one knee of his breeches, with impressions made upon the soil close to the place where the murdered body lay. In a case of

cidences, yet their nature and force are frequently such as wholly to exclude the truth of any other hypothesis.

Lord Coke, as an instance of presumptive judicial proof, supposes the case where a man is found dead in a house, having been stabbed with a sword, and another is seen coming out of the house with a bloody sword in his hand, no other person having been in the house. Here the circumstances, and consequently the coincidences, are few, but they are of such a nature as wholly and necessarily to exclude any but one hypothesis. So in the ordinary case of larceny, where stolen goods, recently

after the commission of the felony, are found in the possession of the prisoner, who gives no account for the purpose of explaining that possession; although the coincidences between the hypothesis that he was the thief, and the circumstances, be but two in number, viz. his *possession* of the property, and his *omission* to account for that possession, yet the latter is of an exclusive nature and tendency; it forcibly tends to *exclude* any supposition of an honest possession.

(g) This case was cited by the Lord Chancellor, in the course of a debate in the House of Lords, 1820.

robbery, it appeared that the prosecutor when attacked, had, in his own defence, struck the robber with a key upon the face, and the prisoner bore an impression upon his face which corresponded with the wards of the key. All circumstances of this nature are, as it were, mechanical links or ties which connect the supposed agent with the act which is the subject of inquiry. Further observations on this branch of the subject would be superfluous, and inconsistent with the object of the present work. There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature, or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent. Experience points out some laws of human conduct almost as general and constant in their operation, as the mechanical laws of the material world themselves are. That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime, or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it; are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

Moral c
incident

The presumption that a man will do that which tends to his obvious advantage, if he possess the means, supplies a most important test for judging of the comparative weight of evidence. It is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted (*r*).

If, on the supposition that a charge or claim is unfounded, the party against whom it is made has evidence within his reach by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion. This consideration in criminal cases frequently gives a conclusive character to circumstances which would otherwise be of

(*r*) See Lord Mansfield's observations in *Blatch v. Archer*, Cowp. 65.

Moral co-
incidences.

an imperfect and inconclusive nature (s). Thus, where the evidence against a prisoner on a charge of larceny consists in his recent possession of the stolen property, his very silence as to the fact of possession raises a strong presumption against him ; for if his possession was an innocent one, as the fact must necessarily be within his knowledge, he might show, by statement, at all events, if not by proof, that such possession was consistent with his innocence. The same observations apply in general where appearances are proved against an accused person, which he refuses to account for or explain ; such as marks of blood and violence on his dress and person, the possession of concealed weapons, and the like.

The same principle applies where a party, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker and inferior nature. So pregnant with suspicion is conduct of this nature, that the law, as has been seen, has laid down an express and peremptory rule upon the subject, which in cases within the scope of its operation actually excludes the inferior evidence. It is for the jury, in their discretion, to apply the principle, in cases which do not fall within the defined limits of the rule. Although a party may not be compellable to produce evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage (t). Again, the maxim of law is, *omnia præsumuntur contra spoliatorem* (u).

In the case of *Harwood v. Goodright* (x), it was found by a special verdict that the testator made his will, and gave the premises in question to the plaintiff in error, but afterwards made another will different from the former, but in what particulars did not appear ; the Court decided that the devisee under the first will was entitled against the heir-at-law. But Lord Mansfield said, that in case the defendant had been proved to have *destroyed* the last will, it would have been good ground for the jury to find a revocation. And as the destruction or withholding of evidence creates a presumption against the party who has had recourse to such a practice, so *à fortiori* does the actual fabrication or corruption of evidence (y).

(s) Noti che le prove imperfette delle quale puo il reo giustificarsi è non lo faccia dovere divengono perfette. Beccuria, s. 14.

(t) See Lord Mansfield's observations in *Roe d. Haldane v. Harvey*, Burr. 2484.

(u) See Lord Mansfield's observations in *Haldane v. Harvey*, Burr. 2484.

(x) Cowp. 86.

(y) See the judicious remarks of Mr. Evans (2 Pothier, by Evans, 337). He justly observes, that one of the most difficult points in the *Douglas cause* arose

The discovery of such practices must naturally and unavoidably excite a considerable degree of jealousy and suspicion, and ought undoubtedly to be most seriously weighed in estimating the degree of credit to be attached to other evidence adduced by the same party, where it is in its own nature doubtful and suspicious, or is rendered so by conflicting evidence. A considerable degree of caution is nevertheless to be applied in cases of this description, more especially in criminal proceedings; for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood and deception, for the purpose of manifesting his innocence (z) and ensuring his safety.

The connexion between a man's conduct and his motives is also one of a moral nature, pointed out by experience. It is from their experience of such connexions that juries are enabled to infer a man's motives from his acts, and also to infer what his conduct was, from the motive by which he was known to be influenced. In criminal cases, proof that the party accused was influenced by a strong motive of interest to commit the offence proved to have been committed, although exceedingly weak and inconclusive in

Conduct
and inten-
tion.

from Sir John Stewart's having fabricated several letters as received from La Marre, the surgeon; and cites the following passage from Mr. Stuart's observations on the subject:—

"I had been accustomed to think, that in judging upon evidence, a matter of such infinite importance in the constitution and jurisprudence of every well-regulated State, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery* and *fraud* in some of the material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry; in such a case I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature.

"The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candour, is to make them extremely suspicious of all the

evidence tending to the same conclusion with the forged evidence. Parol testimony in support of it will be little regarded; the forgery of the written evidence contaminates the testimony of the witnesses in favour of the party who has made use of that forgery; and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested and consistent witnesses, speaking to decisive and circumstantial facts as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

"On the other hand, the proof of a forgery, such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favour of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence."

(z) *Supra*, 52.

itself, and although it be a circumstance which ought never to operate in proof of the *corpus delicti*, yet when that has once been established *aliunde*, it is a circumstance to be considered in conjunction with others which plainly tend to implicate the accused (a).

Again, presumptions of great importance, especially in criminal proceedings, arise frequently out of the connexion between the acts of a party, and his intentions, consciousness and knowledge. That a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence (b). Again, the usual connexion between the conduct of a criminal agent and the supposition of his guilt, are of too obvious a nature to be dwelt upon. The seeking for opportunities fit for the occasion; the providing of poison, or instruments of violence, in a secret and clandestine manner; the subsequent concealment of them; attempts to divert the course of inquiry (c), or prevent investigation as to the cause of death; not unfrequently excite just cause of suspicion: above all, the restless anxiety of a mind conscious of guilt very frequently prompts the party to take measures for his security which eventually supply the strongest evidence of his criminality.

Coincidences from ordinary experience.

In judicial investigations, as well as in the ordinary course of life, that is more or less probable and likely, and is therefore, in a greater or less degree, an inducement to belief, which more or less agrees with former observation. This is a ground of assent, warranted as well by philosophy as by ordinary experience. It is probable that whatever has happened will again happen under similar circumstances, however ignorant we may be of the nature or necessity of the connexion; the very frequency of the association is evidence of the connexion; there is no association what-

(a) On the other hand, the total absence of any apparent motive must always operate strongly as a circumstance in favour of the accused, especially where there is no reason to apprehend any unsoundness of intellect. *A fortiori*, does the principle operate where the supposed agent was actuated by contrary motives. And even in cases which involve a conflict of motives, such as infanticide, where natural feelings on the one hand are opposed to a desire of avoiding shame and detection on the other, the former are necessarily entitled to the highest consideration.

(b) See Vol. II. tit. INTENTION—MALICE.

(c) I have remarked that persons of the lowest classes of society, before the commission of premeditated murder, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim. This is a circumstance which I apprehend is to be attributed principally to an expectation that by this means less of surprise and of inquiry will take place when the crime has been accomplished.

soever, whether it be moral, natural, or artificial, whether it depend on the nature and constitution of the human mind, the laws of nature, or the artificial manners and habits of society, which is not rendered probable in proportion to the frequency and constancy of the connexion. Hence it is, that where circumstances found to be usually associated with the fact in question are known to exist, such associations are connecting links between the known circumstances and the fact, and render its existence more or less probable (*d*). On the other hand, it is scarcely necessary to remark, that experience of the usual or constant disunion of particular facts and circumstances necessarily renders their future association unlikely and improbable, and is a proper inducement to disbelief more or less strong according to circumstances.

It is further to be remarked, that the force of evidence resulting from the concurrence of circumstances depends not merely upon the degree of improbability that those coincidences were merely casual and fortuitous, but frequently also upon that improbability, compounded with the further improbability that another hypothesis is true which is not supported by any circumstances. Thus in a criminal case where all the circumstances of time, place, motive, means, opportunity and conduct, concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent, although, had any other existed, he must have been connected with the perpetration of the crime by motive, means and opportunity, and by circumstances necessarily accompanying such acts, which usually leave manifest traces behind them.

Absence of evidence tending to a different conclusion.

In estimating the force of a number of circumstances tending to the proof of the disputed fact, it is of essential importance to consider whether they be dependent or independent. If the facts *A.*, *B.*, *C.*, *D.*, be so essential to the particular inference to be derived from them, when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested fact

Dependent and independent circumstances.

(*d*) A striking instance to show the extent to which philosophical inferences may be carried by means of careful observation and analogical reasoning, may be derived from the science of comparative anatomy.

From a single fossil bone of an animal whose very species is extinct, a skilful anatomist is able to represent the original animal perfect in all its parts.—See Cuvier's Fossil Remains.

Independ-
ency of
the circum-
stances.

which they did before, they would be properly termed independent facts (e). The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such dependent facts, provided they be established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception. On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances (f).

It seems to have been considered, that even mere coincidences, although not of an exclusive nature, may by their number and joint operation be sufficient to constitute a conclusive proof (g). It rarely, however, happens in practice, that circumstantial proofs consist purely in mere natural and mechanical coincidences, unconnected with any of a moral nature and conclusive tendency.

Force of
concurring
probabili-
ties.

The probability derived from the concurrence of a number of independent probabilities increases not in a merely cumulative, but in a compounded and multiplied proportion (h). This is a

(e) Quando le prove di un fatto tutte dipendono egualmente da una sola, il numero delle prove non aumente nè sminuisce la probabilità del fatto, perchè tutto il loro valore si resolve nel valore di quella sola da cui dipendono. Quando le prove sono indipendenti, l'una dall' altra, cioè quando gli indizi si provano altronde che da se stessi, quanto maggiori prove si adducono, tanto più cresce la probabilità del fatto, perchè la fallacia di una prova non influisce sull' altra. Beccaria, s. 14.

(f) *Infra*, note (h).

(g) *Mattheus de Crim.*: Possunt diversa genera ita conjungi ut quæ singula non nocerent ea universa tanquam grande reum opprimunt.—According to Beccaria, chap. 14: Possono distinguersi le prove di un reato in perfette ed in imperfette. Chiamo perfette quelle che escludono la possibilità che un tale non sia reo; chiamo imperfette quelle che non la escludono. Della prima anche una sola è sufficiente per la condanna, delle seconde tante son necessarie quante

bastino a formarne una perfetta, vale a dire che se per ciascuna di queste in particolare è possibile che uno non sia reo, per l'unione loro nel medesimo soggetto è impossibile che non lo sia. Beccaria, s. 14.—Singula levia sunt et communia, universa vero nocent etiam si non ut fulmine, tamen ut grandine. Quintil.

(h) According to the principles of pure abstract mathematical reasoning, the probability arising from the concurrence of a number of independent circumstances, each of which induces a probability in favour of a particular event, is *compounded* of all the probabilities incident to the individual circumstances. When, therefore, the circumstantial probabilities are each considerable, the compound probability in favour of the event increases by a rapid progression. If the circumstances, *A, B, C*, severally induce probabilities in favour of an event represented by $\frac{a}{m} \frac{b}{m} \frac{c}{m}$, that is, if in every *m* cases the circumstance *A*. ne-

consequence derived from pure abstract arithmetical principles. For although no definite arithmetical ratio can be assigned to each

Force of
concurring
probabilities.

cessarily involved the event in question a times, and excluded it $m - a$ times, and so on, and the circumstances A, B, C , were wholly independent of each other, then the probability of the event, arising from the happening of all these circumstances, would be to the probability against it as $m^3 - m - a \cdot m - b \cdot m - c$ to $m - a \cdot m - b \cdot m - c$.

If the witnesses A, B, C , bore testimony to independent facts, each of which, if true, involved the truth of a particular event, and A were the witness of truth in a cases,

and his testimony were false in $m - a$ cases, and so of the testimony of B , and of C , then the probability of the event, arising from their joint testimony, would be to the probability against it in the ratio above expressed.

And if $m = 2$ and $a = b = c = 1$, the probability in favour of the event would be to the probability against it as 7 : 1.

Again, if the probability in favour of a particular fact, arising from the testimony of A , were to the probability against it as $a : m - a$, and so on, as to the testimony of B and C , the probability of the fact from their united testimony would be to the probability against it as $a \cdot b \cdot c$ to $m - a \cdot m - b \cdot m - c$. And if $m = 2$ and $a = b = c = 1$, the ratio would be that of 1 : 1; that is, their united testimony would produce no increase of probability in favour of the fact.

Such considerations admit but of a very partial and limited application in the investigation of questions arising out of the common concerns of life. The basis of all such calculations is a comparison of all the different cases which involve the particular event with those which exclude it, which assumes the possibility of resolving all possible cases, which either involve or exclude the event, into a definite number of the

one class and of the other, each of which is equally likely to happen*. The most complicated and laboured analytical results on the subject of probabilities, are little more than modifications of this comparison. It is obvious, upon the slightest consideration, that the probability of error or mistake on the part of a witness, or of his honesty and sincerity, usually admits of no such comparison; still less can the complicated transactions of life, dependent as they are upon an almost infinite variety of circumstances and motives, be subjected to such an analysis. But the principle may no doubt operate by way of approximation, although the concurrent probabilities may admit of no numerical measure; and whenever probabilities are deducible from independent circumstances, the degree of probability must necessarily be multiplied by their concurrence. In criminal cases, however, it seems to be perfectly clear in principle that the conjoint effect of circumstances, which individually are inconclusive in their nature, cannot in its nature be conclusive, unless the resulting probability be indefinite, and exceed the powers of calculation. Where mere independent and unconnected circumstances are in their nature imperfect and inconclusive, the degree of probability which results from their united operation, although greatly increased in degree, must still in its nature be definite and inconclusive, and therefore inadequate to the purposes of conviction. Let it, for instance, be supposed, that A is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns and seven sovereigns, and that a person, apprehended in the same fair or market where the robbery takes place, is found in possession of the same remarkable combination of coin, and of no other, but that no part of the coin can be identified, and that no circumstances operate against the prisoner except his possession of the same

Force of
concurring
probabilities.

independent probability, yet the principle of increase must obtain wherever independent probabilities in favour of an event concur, although they cannot be precisely measured by space or numbers; and even although every distinct probability which is of a conclusive tendency exceeds every merely definite numerical ratio.

It is, however, to be remarked, that wherever mere inconclusive probabilities concur, the result, however the degree of probability may be increased by the union, will still be of a definite and inconclusive nature. And hence it seems, that in criminal cases the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, cannot afford a just ground for conviction.

On the other hand, the force of circumstances of a conclusive nature may be greatly confirmed and strengthened by their combination with other and independent circumstances, which render the fact probable, although the latter be in themselves of an imperfect and inconclusive nature. Again, it is to be observed, that although in the course of judicial proofs the number of concurring probabilities is usually limited, yet that cases may be put where the number and extent of the coincidences are so great as to exceed all definite limits, and where, consequently, the resulting probability is of a conclusive nature (i).

It is to be remarked, that in thus referring to the doctrine of

combination of coin: here, notwithstanding the very extraordinary coincidences as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature.

On the other hand, evidence of a *conclusive* nature and tendency is restricted by no limits of mere probability. In the case of the ordinary presumption, that an admission of a fact made by a party contrary to his obvious interest, is truly made, the probability that the admission is true far exceeds the limits of mere numerical comparison. In some instances mere mechanical coincidences are of this description. Thus, in the ordinary case, where cloth is cut and stolen from a loom, the perfect coincidence between the cloth found in the possession of the prisoner and the remnant left behind, is of this description; the probability of identity arising from the perfect coincidence of the severed threads exceeds the bounds of arithmetical calcu-

lation, and deprives the mind of all power of attributing such a series of coincidences to mere accident.

But even in criminal cases, where a high degree of probability results from repeated coincidences, although that probability be of a definite and numerical nature, such coincidences may, in conjunction with others, constitute a complete and satisfactory proof. Thus, in the case already supposed, of a singular coincidence between the quantity and description of coin stolen with that found in the possession of the prisoner, although the fact, taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury.

(i) See the preceding Note.

numerical probabilities, it is the principle alone which is intended to be applied, in order that some estimate may be formed of the force of independent and concurring probabilities. The notions of those who have supposed that mere moral probabilities or relations could ever be represented by numbers or space, and thus be subjected to arithmetical analysis, cannot but be regarded as visionary and chimerical.

From this short view of the subject it appears to be essential to circumstantial proof, First, *that the circumstances from which the conclusion is drawn should be fully established.* If the basis be unsound, the superstructure cannot be secure. The party upon whom the burthen of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are but few, and depend on the credit and testimony of one or two witnesses. Where all the circumstances rest on the testimony of a single witness the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it: for in addition to the question whether the witness was faith-worthy, another question would arise, that is, whether the inference was correctly drawn from the facts which he was supposed to prove.

Basis of
circum-
stances.

It is obvious that the number of circumstances stated by a witness does not add to the force of his direct testimony, unless they be such as admit of contradiction if his testimony be false.

The number of circumstances is not only essential, inasmuch as it repels any suspicion of fraud, but from the consideration that the greater the number of circumstances is, the greater will be the certainty as to the conclusion deduced. A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with and reconciles them all is the true one.

Number of
circum-
stances.

Although all facts and circumstances connected with the subject of inquiry be admissible in evidence to explain its nature, and although all facts must necessarily be consistent with truth, yet it is to be recollected that facts themselves may be simulated and fabricated with a view to deceive and mislead. Such facts, however, are necessarily exposed to great danger of detection, from

False
circum-
stances.

the obvious difficulty of uniting by artful means that which is false with that which is genuine, and thus substituting a false and artificial for a real consistency and context of circumstances.

The great difficulty of practising frauds of this description, and their liability to detection from a careful examination and comparison of circumstances, will be best elucidated by a few examples. Attempts at this kind of deception have not unfrequently been made with a view to conceal the crime of murder, and in order to produce belief that the party died from natural or accidental causes, or was *felo de se*: in the detection of such impostures the testimony of medical practitioners cannot be too highly appreciated.

False
circum-
stances.

The remarkable case of Sir Edmundbury Godfrey may be cited as an instance of this kind (*k*). The deceased was found in a ditch at Chalk Farm, in the neighbourhood of London, his own sword passing through his body, so that the end projected two hands' breadth behind the back; his gloves and some other things were laid on the bank, so as to excite a belief that he had destroyed himself. But there was no blood about the place, and upon drawing the sword out of the body no blood followed. The body was discoloured and bruised, and the neck so flexible that the chin could be turned from one shoulder to the other. The deceased had in fact been strangled.

In the State Trials a very singular case of the same description is also mentioned, of a woman who was found in bed with her throat cut: her husband's relations (the husband being absent from home at the time) occupied the apartment adjoining to the chamber of the deceased, and there was no access to her chamber but through their apartment. The relations who thus occupied the adjoining apartment, had arranged matters so that it might be supposed that the deceased had destroyed herself; but one circumstance amongst others was conclusive to destroy this supposition, for on the *left* hand of the deceased was observed the bloody mark of a *left* hand, which of course could not have been that of the deceased.

Another instance, cited in a lately published and able work on Medical Jurisprudence (*l*), is to this effect:—A citizen of Liege was found shot, and his own pistol was discovered lying near him, and no person had been seen to enter or leave the house of the de-

(*k*) In the State Trials.

the same subject, by Dr. Smith and

(*l*) By Dr. Paris and J. S. M. Fonblanque. See also the publications on

Dr. Male.

ceased ; from these circumstances it was concluded that he had destroyed himself, but on examining the ball by which he had been killed it was found to be too large to have been discharged from that pistol, in consequence of which suspicion fell upon the real murderer.

Secondly : It is essential *that all the facts should be consistent with the hypothesis*. For as all things which have happened were necessarily congruous and consistent, it follows, that if any one established fact be wholly irreconcilable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincide and agree with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution ; yet if the incongruity could not eventually be removed, the hypothesis would fall, although no other could be suggested (*m*).

Consistency of the facts with the hypothesis.

Thirdly : It is essential *that the circumstances should be of a conclusive nature and tendency*. Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favour of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is on the other hand of a conclusive nature and tendency, when the probability in favour of the hypothesis exceeds all arithmetical or definite limits.

Conclusive tendency.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true : for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favour of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be. To hold that any finite degree of probability shall constitute proof adequate to the conviction of an offender, would in reality be to assert, that out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest ; a propo-

(*m*) It was on this principle that the French philosophers opposed Newton's system of the world. They objected that the calculations formed upon his hypothesis made the motion of the moon's apses but one-half as great as they were

proved to be by actual observation. It was afterwards discovered that the error was in neglecting a tangential force in the calculation ; and it was found that when this was taken into the account, the theoretical result coincided with the fact.

Conclusive
tendency.

sition which is as inconsistent with the humane spirit of our law as it is with the suggestions of reason and justice. The maxim of law is, that it is better that ninety-nine (*i. e.* an indefinite number of) offenders should escape, than that one innocent man should be condemned.

Thus, in practice, where it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

The principle extends to all cases where the ultimate tendency of the evidence is of an inconclusive nature, that is, where admitting all to be proved which the evidence tends to prove, the guilt of the accused would be left either wholly uncertain, or dependent upon some merely definite probability (*n*).

It is very possible, indeed, that mere coincidences may be so numerous, as by force of multiplied probability to exclude all reasonable doubt; but this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation. Whenever the probability is of a definite and limited nature (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial), it cannot be safely made the ground of conviction; for to act upon it in any case would be to decide, that for the sake* of convicting many criminals, the life of one innocent man might be sacrificed.

The distinction between evidence of a conclusive tendency which is sufficient for this purpose, and that which is inconclusive, seems to be this: the latter is limited and concluded by some degree or other of finite probability, beyond which it cannot go;

(*n*) The very remarkable case of Mr. Barnard, who was tried on a charge of sending a threatening letter to the Duke of Marlborough, affords an illustration of these positions. The Duke was twice required, by letter, to meet the writer, and on both occasions was met by the prisoner: the one place of assignation was near a particular tree in Hyde Park; the other, in an aisle of Westminster Abbey. That Mr. Barnard should, by mere accident, have been at both places at the very time appointed for the meetings, was certainly most remarkable: yet, notwithstanding the strong degree of suspicion created by such coincidences, they were clearly insufficient, without more, to war-

rrent a conviction. The prisoner was, nevertheless, put upon his defence, and produced evidence to show that those coincidences were purely accidental. Perhaps the real clue to the transaction may be this, that the prisoner was a party to the transaction, although no real intention existed of profiting by the contrivance. The rank and situation of the prisoner in society, and the obvious impossibility of his ever enjoying that which he demanded, are circumstances strongly tending to exclude such a supposition, and the nature and style of the demand render it probable that the real object of the writer was not personal gain.

the former, though not demonstrative, is attended with a degree of probability of an indefinite and unlimited nature. Conclusive tendency.

It frequently happens, as has been seen, that where the evidence of the circumstances attending the transaction itself would be imperfect and inconclusive, it derives a conclusive nature and tendency from a consideration of the conduct of the accused. The ordinary motives of self-preservation and self-interest, common to all mankind, furnish the strongest presumption that a party would explain, by statement at all events, and by proof where it was practicable, such evidence as tended to his prejudice. Hence it is that circumstances, which abstractedly considered would be inconclusive, acquire a conclusive character and tendency from the silence of the adversary, or his failure in attempting to explain them (d).

Where the evidence to prove larciny consists in the recent possession of the stolen property, it is in itself imperfect and inconclusive. But if the evidence of possession be coupled with the consideration, that the party charged, having it in his power to account for the possession, if it really consist with his innocence, either refuses to account for the possession, or attempts to impose a false account, the evidence is then conclusive in its nature and tendency, and is proper for the consideration of the jury.

Fourthly: It is essential *that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.* Exclusion to a moral certainty.

Hence results the rule in criminal cases, that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body: a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle already alluded to, cited by Sir Edward Coke and Lord Hale (p). So Lord Hale recommends that no prisoner shall be convicted of larciny in stealing the goods of a person

(o) *Supra* 563.

(p) *Supra*, 52, and Vol. II. tit. MURDER.

unknown, unless the fact of the robbery be previously proved (*q*). The same principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes (*r*), by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected that it is by no means improbable that a person bent on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture, consequent on a verdict of *felo de se* (*s*).

Inquiry as
to other
hypotheses.

The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire, with the most scrupulous attention, what other hypotheses there may be which may agree wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more minute examination of those facts with which at first they might appear to be inconsistent; and it is possible that upon a more minute investigation of those facts their authenticity may be rendered doubtful, or may be even altogether disproved. In criminal cases the statement made by the accused is in this point of view of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances of the case, may escape the acutest penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them; and though he be unable to support his statement by evidence, his account of the transaction is for this purpose

(*q*) Vol. II. tit. LARCINY.

(*r*) See the trial of Spencer Cowper, esq., for the alleged murder of Mrs. Sarah Stout; St. Tr. The doubt which arose in that case upon the conflicting evidence, whether the death of the deceased had been occasioned by mere accident, or by her own act, or by the act of another, afforded, as it seems, a decisive ground of acquittal.

(*s*) In a little work, intitled, The Theory of Presumptive Proof, is cited the case of Thomas Harris, who was executed at York, for the murder of James Gray, in

the year 1642. According to that statement, Harris kept a public-house, and was charged by his man-servant, Morgan, with having strangled James Gray, a travelling guest, in his house; upon the testimony of Morgan, aided by some circumstantial evidence, as to the prisoner's having on the same morning concealed some money in his garden, the prisoner was convicted and executed, although *no marks of violence* appeared on the body of the deceased, and who had in fact died of apoplexy, as appeared by the subsequent confession of the witness himself.

always most material and important. The effect may be on the one hand to suggest a view of the case which consists with the innocence of the accused, and which might otherwise have escaped observation; on the other hand, its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.

The recent possession of stolen property is, independently of the conduct and declarations of the accused, or of his silence, very imperfect evidence of guilt; the apparent possession may have resulted from the malicious act of some other person. In a case, therefore, where no act of concealment or assumption of property can be proved, and the accused is consistent in denying all knowledge of possession, such a defence becomes entitled to the most serious attention, and exacts a most rigorous inquiry as to its truth or probability; where, on the other hand, the prisoner admits the possession, and attempts to account for it by a false statement, the necessity for such an inquiry does not arise (*t*).

What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence

To the exclusion of all reasonable doubt.

(*t*) A lamentable case occurred some years ago (I state from common report only) which strongly illustrates the necessity of exerting the utmost vigilance in negating satisfactorily every other possible hypothesis, in a case of purely circumstantial evidence. A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong; no persons were in the house but the murdered mistress and the prisoner, the doors and windows were closed and secure, as usual; upon this and some other circumstances the prisoner was con-

victed, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of the opposite to an upper window of the house of the deceased; and that the murderers retreated the same way, leaving no trace behind them.

exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest ; and in no case, as it seems, ought the force of circumstantial evidence, sufficient to warrant conviction, to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence.

Circumstantial evidence ought not to supersede direct evidence.

Lastly : It seems that mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is wilfully withheld by the prosecutor. Where direct evidence is attainable, circumstantial evidence is of a secondary nature ; besides, the great excellence of indirect evidence is its freedom from suspicion, and no greater discredit can be thrown upon it than by the withholding of direct evidence.

Observations on conflicting evidence.

In cases of conflicting evidence, the first step in the process of inquiry must naturally and obviously be to ascertain whether the apparent inconsistencies and incongruities which it presents may not without violence be reconciled, and if not, to what extent, and in what particulars, the adverse evidence is irreconcilable ; and then, by careful investigation and comparison, to reject that which is vicious ; and thus, if it be practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Conflicting testimony.

Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they be not in reality reconcilable, especially where there is no extrinsic reason for suspecting error or fraud. But if their statements upon examination be found to be irreconcilable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and wilful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as of law in favour of innocence, will attribute a variance in testimony to the former rather than the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected ; and it is for a jury to determine whether in the particular instance they are of such a nature and character, under all the circumstances, that they may be or cannot be attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention,

or of attention to particular subject-matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances in a medical or surgical case, and to form from them correct conclusions, than an unskilful and inexperienced person would be likely to do. Much also must depend upon a comparison of the means and opportunity which the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending; and here it is to be observed, that there is an important distinction between positive and negative testimony.

If one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present, but did not see or hear it, and the witnesses were equally faithworthy, the general principle would in ordinary cases create a preponderance in favour of the affirmative; for it would usually happen that a witness who swore positively, minutely and circumstantially, to a fact which was untrue, would be guilty of perjury, but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true; the falsity of the testimony might arise from inattention, mistake, or defect of memory; and therefore, even independently of the usual presumption in favour of innocence, the probability would be in favour of the affirmative. If, for instance, two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true, and yet each might swear truly. It is not only possible but probable that the latter witness, though in the same room, through inattention, might be unconscious of the fact, or, being conscious of it at the time, that the recollection of it had afterwards faded from his memory. It follows, therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appear, the presumption in favour of human veracity operates to support the affirmative.

Positive
and nega-
tive testi-
mony.

And further, when, in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other, or that, under the circumstances, the attention of the latter was not so likely to be so fully excited and particularly directed to the facts, this prin-

Positive
and nega-
tive testi-
mony.

ciple co-operates with the weight of evidence in favour of the former, in all cases where there is room for error or mistake.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. If in the instance above supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining by their senses whether it would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

It is also observable that this principle is inapplicable where a negative depends on the establishment of an opposite positive fact. Thus an *alibi* negatives the actual commission of a crime by the prisoner; but the evidence is of as direct and positive a nature as that which tends to prove his presence and actual commission of the crime.

Conflict of
testimony.

Where the testimony of conflicting witnesses is irreconcilable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict. The first point of comparison is their character for integrity. This may either depend on positive evidence as to their previous situation (*u*), conduct and character, or

(*u*) The Roman law was far more copious than our own is, in its rules of exclusion.—Consequens est ut in omnibus causis fidem testium elevet ætas puerilis, insaniam, *conditio vitæ, turpitudine, paupertas magnum opprobrium*, &c. Heinecc. El. J. C. Part IV. sec. cxxxvi. L. 10, ff. L. 10, c. h. t.—Nec servorum testimonio credendum esse nisi alia desit ratio veritatem eruendi. Ib. sec. cxxxviii. L. 7, ff. h. f.—Vacillare fidem mulierum quæ quæstum corpore fecerunt. L. 3, § 5, h.—Eorum qui vitam ad cultrum vel ad depugnandas bestias locarunt. L. 3, § 5, h. f.—Omnium viliorum

et pauperum quamdiu aliorum est copias ad. L. 3, ff. L. 18, c. h. t.—Ut merito repellantur pater in causâ filii, filius in causâ patris, alique potestati vel imperio alterius subjecti vel domestici. L. 6, L. 9, L. 24, f. L. 3, L. 6, c. h. t.—Ut suspecti etiam sunt amici et inimici. L. 3, pr. ff. L. 5, L. 17.—Although a proper sense of the sacred obligation of an oath may be equally strong in every condition of society, yet the temporal consequences of detected perjury or prevarication may frequently depend much on the witness's rank or situation in life. To a common

may be matter of inference and presumption, from their relative situation as to the parties, or the subject-matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biassed. Where testimony is equally balanced in all other respects, a slight degree of interest or connexion may be sufficient to turn the scale. In such cases also, any variance in the testimony of the witness from a former statement relating to the same transaction, if it be established and not explained, necessarily tends to impeach either his integrity or his ability.

All those circumstances which were likely to influence and bias witnesses in favour of the party, are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration: not only may the stronger motives arising from the ties of consanguinity, friendship, or expectation of future gain, cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also, in cases where in other respects the weight of testimony is nicely balanced, may many considerations of an inferior and weaker description; such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favour of a party from connexion in the way of trade, profession, or membership of any description (*x*): considerations of this kind, which would frequently afford not the slightest ground for questioning the credit of an unimpeached witness, may become of essential importance when the credit of conflicting witnesses is in other respects in a state of equipoise.

labourer, the temporal consequences of a violation of his oath would probably be confined merely to temporal punishment, and that only upon a conviction after an expensive legal process; whilst to a solicitor or attorney, whose professional existence depends upon his reputation and credit, loss of character consequent upon detection, although there should be no conviction, might end in his ruin. Considerations of this nature must obviously possess a contrary tendency where the testimony of a witness tends to repel and remove some charge of improper conduct, which would otherwise affect his reputation. Thus, upon a question, whether a testator was capable of executing a will, a professional

witness, whether legal or medical, has an interest in proving the capacity for the fact that he had made or even witnessed a will, executed by one utterly incapable of making one, would affect his professional character. Such observations apply in those cases only of doubt and suspicion where the evidence is of a conflicting nature.

(*x*) Parimente la credibilità di un testimonio può essere alcuna volta sminuita quand' egli sia membro d'alcuna società privata, di cui gli usi, e le massime siano o non ben conosciute o diverse dalle pubbliche. Un tal uomo ha non solo le proprie ma le altrui passioni.—Beccaria, c. 13.

Demeanour
of the wit-
nesses.

Such considerations become still more important where any suspicion arises from the manner and demeanour of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent. Manifestations of warmth and zeal beyond those which the occasion naturally calls for, over-forwardness in testifying that which will benefit the party for whom he testifies, and ill-concealed reluctance in declaring that which tends to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and cunning, are, with a multitude of others, tests for estimating the true character of a witness and the value of his testimony.

But above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is a great test of credibility.

Consistency of testimonies and comparison with circumstances.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth will consist with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention (*y*), and will exhibit that degree of solid coherency which necessarily results from a real and actual connexion and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete: with false witnesses the very reverse takes place; their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other, and with those which are known to be true.

With written documents.

In cases of conflicting testimony, and particularly where the subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written documents connected with the transaction are, on account

(*y*) Dr. Paley, with reference to historical evidence, says, "The undesignedness of coincidences is to be gathered from their latency, their minuteness, their obliquity; the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they

are traced out, demonstrate that they have not been produced by meditation or by any fraudulent contrivance; but coincidences from which these causes are excluded, and which are too close and numerous to be accounted for by accidental concurrence of fiction, must necessarily have truth for their foundation."

of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresentation or mistake; whilst writings are permanent, and, as has well been observed, are witnesses difficult to be corrupted (*z*).

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses, subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect. So true is it that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal (*a*). It is by the test of a public examination, and by that alone, that the credit of a witness, both as to honesty and ability, can be thoroughly tried and appreciated (*b*). *Nam minus obstitisse videtur pudor inter paucos signatores* (*c*), is an ancient and a powerful observation in favour of oral testimony.

As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.

Total rejection of testimony.

It is scarcely necessary to observe, that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy. Neither does the principle apply to testimony given in favour of the adversary; such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of a corrupt witness to conceal it. Hence it is a general principle, that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it (*d*).

(*z*) Montesquieu, *Espr. de Loix*, l. 28, c. 44.

(*c*) Quinctil. l. 5, c. 6.

(*a*) 3 Bl. Comm. 373.

(*d*) See Lord Mansfield's observations in *Bernon v. Woodbridge*, Doug. 751.

(*b*) *Supra*, 25. See Pothier, by Evans, vol. 2, p. 235.

Rejection
of testi-
mony.

The rejection of the witness may not be the only consequence of detection ; for if there be reason to suppose, from the circumstances, that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a doubtful case, for suspecting the testimony of other witnesses adduced by the same party. This observation has no weight where it is apparent that the imputation is merely personal, and results from collateral motives independent of the cause.

The presumption is always *primâ facie*, and in the absence of circumstances which generate suspicion, in favour of the veracity of a witness ; but where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid, to the satisfaction of a jury. The ordinary case of an accomplice affords an illustration of this application of the principle : his testimony is in practice deemed to be insufficient unless his credit be established by confirmatory evidence.

Compari-
son of di-
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circum-
stantial
evidence.

As it is universally admitted that circumstantial evidence is in its own nature sufficient to warrant conviction, even in criminal cases, and as the test of sufficiency is the understanding and conscience of a jury, it would be superfluous and nugatory to enter into a discussion of the comparative force and excellence of these different modes of proof, where they do not conflict with each other. In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison ; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty. With regard to the comparative force and efficacy of these modes of proof, it is clear that circumstantial evidence ought not to be relied on where positive proof can be had, and that so far the former is merely of a secondary nature (*e*). Hence it seems to be clear that no conviction in a criminal case ought ever to be founded on circumstantial evidence, where the prosecutor might have adduced direct evidence ; and in civil cases the resorting to such a practice would in a doubtful case be a circumstance pregnant with the strongest suspicion.

The characteristic excellence of direct and positive evidence consists in the consideration, that it is more immediate and more proximate to the fact ; and if no doubt or suspicion arise as to the credibility of the witnesses, there can be none as to the fact to

which they testify ; the only question is as to their credit. On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt, arising, first, upon the question whether the facts upon which the inference is founded are sufficiently established ; and, secondly, upon the question, whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt, whether, in the case of direct and positive evidence, the witnesses are entirely faith-worthy. Where no doubt exists in either case, comparison is useless ; but it is very possible, where there is room for suspecting the honesty or accuracy of direct witnesses, that the force of their evidence may fall far short of that which is frequently supplied by mere circumstantial evidence ; and whenever a doubt arises as to the credibility of direct witnesses, it is an important consideration in favour of circumstantial evidence, that in its own nature it is much less liable to the practice of fraud and imposition than direct evidence is ; for it is much easier to suborn a limited number of witnesses to swear directly to the fact, than to procure a greater number to depose falsely to circumstances, or to prepare and counterfeit such circumstances as will without detection yield a false result. The increasing the number of false witnesses increases the probability of detection in a very high proportion ; for it multiplies the number of points upon which their statements may be compared with each other, and also the number of points where their testimony comes in contact with the truth ; and therefore multiplies the danger of inconsistency and variance in the same proportion.

Comparison of direct with circumstantial evidence.

So, on the other hand, it is exceedingly difficult by artful practice to create circumstances which shall wear the appearance of truth, and tend effectually to a false conclusion. The number of such circumstances must of necessity be limited in their nature ; they must be such as are capable of fabrication by an interested party, and such that their materiality might be foreseen. Hence all suspicion of fraud may be excluded by the very number of concurring circumstances, when they are derived from various but independent sources, or by the nature of the circumstances themselves, when either it was not in the power of the adverse party to fabricate them, or their materiality could not possibly have been foreseen, and consequently where no temptation to fabricate them could have existed.

Consistency of positive testimony with circumstances.

The correspondence or inconsistency of direct evidence with well-established circumstances, is the great, and frequently the only test, for trying the truth of direct testimony which labours under suspicion. A perjured witness will naturally, with a view to his own security, so frame his fiction as to render contradiction by direct and opposite testimony impracticable. He will also be sparing in his detail of circumstances which are false, and which are capable of contradiction; the more circumstantial his statement is, the more open it is to detection. Hence it is that circumstantiality of detail is usually a test of sincerity, provided the circumstances be of such a nature as to be capable of contradiction if they be false; and that, on the other hand, if a witness be copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion. As circumstances are the best and frequently the only means of detecting false testimony, it follows that no fictions are more formidable and more difficult to be detected than those which are mixed up with a large portion of truth; every circumstance of truth interwoven with the fiction, so far from being merely negative in its effect, in affording no aid for detecting the fraud, actually tends to confirm and support it.

It is however to be observed, that positive testimony ought not to be rejected on the ground of inconsistency with circumstances, unless the incongruity be of a conclusive and decisive nature. Mere improbability is usually an insufficient ground for the rejection of positive testimony which labours under no suspicion; for experience frequently shows that circumstances do in reality agree and did actually co-exist, although, from ignorance of the numerous links by which they are united and connected, their co-existence would *a priori* have been deemed to be highly improbable.

When, however, the positive testimony labours under doubt and suspicion, mere circumstantial evidence is frequently sufficient to prevail, although such testimony be not wholly and absolutely irreconcilable with the facts. Thus in the case of Mr. Jolliffe's will, the will was established on circumstantial evidence, in opposition to the direct testimony of the attesting witnesses.

Conflict in circumstances.

Where doubt arises from circumstances of an apparently opposite and conflicting tendency, the first step in the natural order of inquiry is to ascertain whether they be not in reality reconcilable, especially where circumstances cannot be rejected without imputing perjury to a witness: for perjury is not to be presumed; and in the absence of all suspicion, that hypothesis is to be adopted which consists with and reconciles all the circumstances which the case

supplies. In the next place, where the circumstances are inconsistent and irreconcilable, it becomes necessary to inquire which of them are attributable to error or design. Here again, in distinguishing between the real and genuine circumstances, and those which are spurious, regard is to be had to those principles which have already been adverted to: it is rather to be presumed that one witness was mistaken, where there was room for mistake, than that another witness, where the facts exclude all mistake, was wilfully perjured. Where mistake is out of the question, an examination of the different degrees of credit due to the witnesses on whose testimony the conflicting circumstances depend, becomes material; and in such cases a careful comparison of the circumstances which they state, with facts either admitted or fully established, is of the most obvious and essential importance. Every admitted or established fact affords an additional test for trying the truth and genuineness of those which are doubtful, by means of which those which are genuine may be established and become additional tests of truth, and those which are false may be rejected.

Conflict in circumstances.

Whenever any fact is found to be wholly inconsistent with those which are either admitted or indubitably proved, the mere rejection of that single fact, and the difficulty thus removed, is not the only step gained in the progress towards truth; the vicious evidence must have resulted from error or from fraud; and whether under the circumstances it is to be ascribed to the one source or the other, it affords a test for judging of the ability or integrity of the witness, and not unfrequently affords some insight into the conduct of the party.

Rejection of circumstances inconsistent with those which are fully established.

Frauds in circumstantial evidence are of two kinds: a false witness may swear to circumstances purely fictitious, or an honest witness may swear to circumstances which he has really observed, but which have been prepared with a view to deceive; as in the instance already alluded to, where a discharged pistol was placed near the body of a murdered person, to induce a belief that he had destroyed himself. Those of the former description admit of absolute and positive contradiction, or may be detected by the inconsistency of the fictitious circumstances with those established by unexceptionable testimony; and the witness himself is liable to detection in his attempt to interweave that which he has invented with that which is true. Simulated facts, on the other hand, are in themselves true; they are false only inasmuch as they tend to induce a false conclusion. These, however, are open to detection by a careful comparison with established circumstances; it is

Fraud in circumstances.

Conflict of
established
circum-
stances.

beyond the power of human subtlety to create a false consistency of circumstances beyond a very limited extent (*f*).

No cases of conflicting evidence are more difficult of solution than those where facts apparently well established lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. This more especially happens where the obscurity arises from the conduct of the parties concerned; so difficult is it to ascertain the real motives by which the actors in a distant transaction were influenced, or even to determine whether their conduct has not resulted from weakness or caprice rather than from any settled and determinate principles of action, or from the operation of mixed, fluctuating and transitory motives, which can no longer be distinctly traced. The celebrated Douglas cause may be cited as a striking instance of this nature. The gross improbability that Sir John Stuart and Lady Jane would, under the circumstances, have attempted a monstrous fraud, the effect of which might be to deprive their own future offspring of their legitimate rights, and the vast danger and difficulty of carrying such a scheme into execution, by the procurement of two supposititious children, either by stealth or by bribery, situated as they were, with but slender resources in a foreign capital, under the eye of a vigilant police, were circumstances so strong in favour of the legitimacy of the children, that nothing but the strange and unaccountable conduct of the parties could have induced fair and reasonable doubts upon this interesting and important question. To pursue these considerations farther would be inconsistent with the limits of the present treatise. Suffice it to add, that where conflicting probabilities are nicely balanced, it rarely happens that some rule of legal policy does not turn the scale, even in civil cases; and that in criminal proceedings, where reasonable doubts exist, mercy ought to prevail.

(*f*) *Supra*, 48.

END OF VOL. I.

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APPENDIX TO VOL. I.

{ *Note, that the same Arrangement is observed in the Appendix as in the Text, to the pages of which reference is made.* }

Oath which the Witness considers binding, p. 22.

THE st. 1 & 2 Vict. c. 105, enacts that in all cases in which an oath may lawfully be administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.

Affirmation by a Quaker, p. 23.

One who has seceded from the sect of Quakers, although in many particulars he agrees with them, and who will not affirm according to the stat. 9 Geo. 4, c. 32, or in the form given by the stat. 3 & 4 Will. 4, c. 49, or as a separatist, according to the stat. 3 & 4 Will. 4, c. 82, cannot give evidence on his general affirmation. *Doran's Case*, 2 Lewin, C. C. 27; 2 Moody's C. C. 37.

Subpœna, form of, p. 78.

In a subpœna to a witness to give evidence in an action of ejectment, the names of the lessors of the plaintiff should be introduced.

If the original writ of *subpœna* requires the witness to appear on the 27th of May, and the copy served requires him to appear on the 24th, an attachment for disobedience cannot be obtained. *Doe v. Thomson*, 9 Dowl. 948.

Tender of Expenses, p. 78.

If a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. *Blackburn v. Hargreave*, 2 Lew. Cr. Cases, 259.

Expenses of Witnesses, what allowed, p. 78.

Where the senior clerk in the Petty-bag-office in Chancery attended on a *subpœna duces* with the roll of Chancery solicitors at Nisi Prius, such documents being allowed to be produced only on an order by the M. R., and in the custody of the clerk; held, that he was entitled to the usual fee allowed by Lord Hardwicke's Orders, 1743, of such attendance, as a reasonable compensation for a duty on an order of the M. R., as well as in consequence of the *subpœna*. *Bentall v. Sydney*, 2 P. & D. 416; and 10 Ad. & Ell. 162.

The rule of Hil. 4 Will. 4, as to the expenses of witnesses producing documents, does not apply to a party producing ancient records from the Chapter-house, Westminster, and who was required not merely to take care of, but translate and explain them. *Bastard v. Smith*, 2 P. & D. 453.

Witness's Expenses, Action for, p. 79.

Where upon the witness requiring his expenses to be paid, the clerk of the attorney, by his direction, gave him an I O U, the amount of which the attorney afterwards received from the opposite party on the taxation of costs; held, that the witness was entitled to recover the amount from him as for money had and received and on an account stated. *Evans v. Philpott*, 9 C. & P. 270.

Witness—Attachment, p. 80.

A witness, on being served with a *subpœna*, received 1 s. only as conduct-money, and went to the assize town where the trial was to take place, without making any further demand. On the morning of the trial she refused to proceed to the court-house unless she received 9 l.; held, that the plaintiff having made no tender to her of a reasonable amount for her expenses in going back, was not entitled to an attachment against her for disobedience to the *subpœna*. *Newton and Wife, v. Harland*, 9 Dowl. 16.

The Court will only grant an attachment in a clear case of contempt; where the witness attended on a *subpœna duces tecum*, but the documents were not produced, and were such as could not have been admitted in evidence, the Court discharged the rule. *R. v. Russell*, Lord J., 7 Dowl. 693.

Action against for disobeying a Subpœna, p. 80.

In an action against a party for not appearing to give evidence in obedience to a writ of *subpœna ad testificandum*, it is not necessary to show that the defendant was called on his *subpœna* by the officer of the Court, if it be shown by other satisfactory evidence that he was not present at the proper time and place when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence. It is not necessary that the jury should have

been sworn, and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness. *Lamont v. Crook*, 6 M. & W. 615; 8 Dowl. P. C. 737.

The declaration need not aver in express terms that the *subpœna* was served within a reasonable time; the usual averment that "the defendant could and might have appeared, and had no reasonable cause for omitting to do so," is sufficient. *Maunsell v. Ainsworth*, 8 Dowl. 869.

Where the *subpœna* had been altered by the attorney from the original sittings to a subsequent day, without being re-sealed, held, that being a nullity, he was not bound to attend: it is a question for the Judge whether the *subpœna* has been served within a reasonable time before trial. *Barber v. Wood*, 2 Mo. & R. 172.

In case for not attending with documents, &c. at the assizes, alleged to have been holden on the 31st March, action is maintainable, although the writ was not served until the 2d April, the cause not being tried until the 6th. The averment that the defendant could and might have appeared and given material evidence, &c. on the trial, is equivalent to an averment that the trial took place at the time and place mentioned in the *subpœna*, although the want of an express averment might have been bad on special demurrer; held also, that the allegation that such documents were material evidence for the plaintiff, and that by reason of the defendant's non-attendance the plaintiff was non-suited, amounted to a sufficient averment that the plaintiff had a good cause of action. *Davis v. Lovell*, 7 Dowl. 178; and 4 M. & W. 678. And see *Mullett v. Hunt*, 1 C. & M. 752.

After verdict, an allegation that the defendant could have given material evidence, and that the plaintiff could not safely have proceeded to trial without his testimony, is a sufficient allegation of a good cause of action in the original suit: the Judge, at Nisi Prius, has clearly jurisdiction to allow the witness to be called upon his *subpœna* before the jury are sworn, and that the action is maintainable, although the plaintiff withdrew his record. *Mullett v. Hunt*, 1 C. & M. 752; and 8 Tyrw. 875; overruling *Bland v. Swafford*, Peake, N. P. C. 60. And see *Hopper v. Smith*, M. & M. 115.

Witness, how procured, p. 82.

A magistrate issued a warrant, reciting that on complaint made on oath before him of a misdemeanor, the plaintiff was stated to be a material witness; that the magistrate had issued a summons requiring the plaintiff to appear to testify his knowledge, that the summons was proved before the magistrate to have been duly served, but that the plaintiff did not appear to testify, &c., and said that he would not; that it was necessary for the ends of justice that the plaintiff should appear at the next assizes to testify, &c.; the warrant then commanded the constable to bring the plaintiff before the magistrate or some other justice, to find sufficient bail to appear and give evidence at the next assizes and testify, &c.; held, that the warrant was bad, for requiring the plaintiff to give bail at this

stage of the proceedings, assuming that the magistrate had power to bring him up by warrant to give testimony. *Evans v. Rees*, 12 A. & E. 55.

And it seems to be doubtful whether a justice has power to issue a warrant requiring the attendance of a witness where his summons has been disobeyed. The power was denied by Garrow and Burton, J. Chester Sp. Ass. 1816; 1 Burn's J. by D'Oyley & Williams, 1073. Lord Denman, C. J. in the above case of *Evans v. Rees*, intimated his opinion that such a warrant would be legal, the other three Judges intimated no opinion on the point.

In 3 Burn's J. (by D'Oyley & Williams), 207, is a note of a case in which Graham, B. in his address to the grand jury, censures the practice of committing witnesses in default of sureties as a general practice, though he says that in some cases it may be justified. The Court seemed to recognize the authority of *Bennett v. Watson*, 3 M. & S. 1.

Expenses of Witnesses in Criminal Proceedings, p. 82.

The Judge before whom a prisoner is tried for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under 5 Geo. 4, c. 84, s. 22. *R. v. Fimmons*, 2 Mo. & R. 279.

Under the words "in otherwise carrying on such prosecution," in 7 Geo. 4, c. 64, s. 22, extra expenses, which had been incurred in getting up a prosecution, were ordered to be reimbursed. *Lewen and others' Case*, 2 Lew. Cr. Cases, 164.

Under s. 23, the expenses of a prosecutor in a case of perjury, where his name has been put into a *subpcena* as witness, are not limited to his costs as a witness only, although not bound over by the magistrates to prosecute. *R. v. Sheering*, 7 C. & P. 440.

Under s. 28, rewards may be given to witnesses, although they have not been put to expense. *R. v. Barnes*, 7 C. & P. 166.

But where the facts on which such an application is made do not appear in evidence, they must be laid before the Judge upon affidavit. *R. v. Jones*, 7 C. & P. 167.

On an indictment for an attempt to murder by suffocating, the allowance for extra expenses for apprehending the prisoner is within the spirit and intention of the 7 Geo. 4, c. 64, s. 28, though not within the words. *Darkin's Case*, 2 Lew. Cr. Cases, 164.

Under the word "exertions," in 7 Geo. 4, c. 64, s. 28, a gratuity was awarded to a prosecutor for his courage in apprehending the prisoner. *Womersley's Case*, 2 Lew. Cr. Cases, 162.

The phrase "bullock stealing," in the 7 Geo. 4, c. 64, s. 28, applies to give the rewards mentioned in all cases of cattle of that description, as cows, heifers, &c. *R. v. Gillbrass*, 7 C. & P. 444.

A party bound over at the quarter sessions to prosecute at the superior court is entitled to his expenses. *R. v. Paine*, 7 C. & P. 136.

Expenses of medical witnesses on inquests are regulated by 6 & 7 Will. 4, c. 89.

Witnesses for the Prisoner, p. 85.

The Court directed the governor of the gaol to attest a power of attorney, to enable a prisoner to obtain funds out of a savings bank, to enable him to conduct his defence, or for paying a *bond fide* debt. *R. v. Coxon*, 7 C. & P. 651.

And where, from the lapse of time, it might be presumed that the prisoner obtained a portion of the money found in his possession from other sources than the commission of the crime charged, the Judge ordered five pounds to be given up for his defence. *R. v. Rooney*, 7 C. & P. 516.

Subpœna duces tecum, p. 87.

It is no sufficient answer for a witness not obeying a *subpœna duces*, &c. that the instrument required to be produced was immaterial. *Doe d. Butt v. Kelly*, 4 Dowl. 273.

Upon a question of fraudulent description on a sale of an under-tenant's equitable interest in a lease which he had mortgaged, it was held that the attorney of the superior landlord was not compellable to produce the counterpart of the original lease, nor the equitable mortgagee the lease; but that on their refusal, on being called as witnesses on their *subpœnas d. t.*, secondary evidence of the contents might be given for a party who did not claim under it as one of his title-deeds, nor was privileged as the attorney of another who did. *Mills v. Oddy*, 6 C. & P. 728.

On the trial of an information by the attorney-general for penalties, the defendant, who had been held to bail, had subpœnaed the officer from the Queen's Remembrancer's Office to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him, the defendant's counsel wished to put in the affidavit; held, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way; but that if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by the witness, and as related to the defendant himself. *Attorney-general v. Bond*, 9 C. & P. 189.

A witness called on his *subpœna duces tecum* who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose. *Doe d. Rowcliffe v. Earl of Egremont*, 2 Mo. & R. 386.

Protection of Witness, p. 91.

A witness attending an arbitration who stays to wait the event of an application to the Court in consequence of a revocation of the submission and want of pecuniary means of returning, is not privileged from arrest. *Spencer v. Newton*, 5 Ad. & Ell. 818.

Witness—Privilege, p. 91.

Where a party attending as a witness having struck a party in the lobby of the Court, was committed for the contempt, it was held that he had the privilege, as a witness, *redeundo* from the Court, when released from the imprisonment. *R. v. Wigley*, 7 C. & P. 4.

Incompetency—Infancy, p. 94.

The Court, before it will permit a child to be examined as a witness, must be satisfied that, from the course of its religious education, it feels the binding obligation of the oath ; where, before the fact, there had been an absence of all religious education, and the child had only been instructed with a view to being examined, but at the trial showed no real understanding on the subject of religion or a future state, the Judge refused to allow him to be examined. *R. v. Williams*, 7 C. & P. 320.

Competency—Interest must be direct and certain, &c. p. 105.

A solicitor is competent in the Ecclesiastical Court as a witness to support a codicil, having admitted that he retained the proctor for the parties propounding the codicil, but not having admitted his responsibility for costs. *Allen v. M'Phardu*, 2 Curteis, 513.

Where a witness on the *voir dire* stated that, as the plaintiff's agent, he had employed the former attorney in the case, since deceased, that he had not been released, and no demand been made on him ; held, that it not being shown that the witness had clearly made himself liable to the deceased attorney, nor under what circumstances the papers in the case had been transferred by his representatives to the present attorney, nor that the witness was in any way liable to him, and it being equally probable that the lien of the former one had been satisfied, the facts were not sufficient to warrant the rejection of the witness. *Shipton v. Thornton*, 1 Perr. & Dav. 216.

Where the lessee entered into an agreement to assign a lease of premises to B. upon payment of — *l.* by instalments, to indemnify A. from liability to the lessor, with a proviso for re-entry on nonpayment of any of the instalments ; held to amount to an agreement only, and not an actual assignment ; and that in an action by the lessor against the first lessee, B. was not incompetent as an interested witness ; but that if it was equivocal, the objection should be taken on the *voir dire*, to give the witness an opportunity of explanation. *Hartshorne v. Watson*, 5 Bing. N. S. 477.

Where the officer sold the goods taken in execution, after notice of the bankruptcy, and paid over the proceeds ; held, that in an action against the sheriff for money had, &c., the officer being substantially the defendant in the action, was not a competent witness. *Broom v. Bradley*, 8 C. & P. 500.

Direct and Certain, p. 105.

The owner of shares in a railway company transferred his shares to P., having been requested so to do, in order to make him a competent witness in an action against the company; he stated on the *voir dire* that nothing was said as to their being returned, although he believed that there was an understanding to that effect; that the return depended on P.'s honour, but that he would have taken steps to compel the re-transfer: the learned Judge rejected the witness, deeming the re-transfer to be merely colourable, and the plaintiff had a verdict. The Court of Exchequer granted a new trial, on the ground that, although it was perfectly clear that a witness who had really parted with all interest, legal and *equitable*, was competent, yet that the fact was, on the report of the learned Judge, left in some degree of ambiguity. *Bell v. Hull and Selby Railway Company*, 6 M. & W. 701.

Legal Liability resulting, p. 109.

Trespass for taking and distraining goods, pleas justifying the entry and seizure, 1st, alleging the plaintiff to be tenant under a demise from the defendant, and rent in arrear; and 2d, alleging the plaintiff's father to be the tenant, and issues thereon denying such tenancy; held, that in order to show that the plaintiff held under her father, the wife of the latter was incompetent to prove the receipt of rent from the plaintiff, as tenant to her husband, as the latter would be liable to indemnify the son for a payment he was rendered liable to by the father's default, so that she had a direct interest in disproving the father's tenancy, which was the fact in issue. *Wedgewood v. Hartley*, 10 Ad. & Ell. 619; and 4 P. & D. 84.

Liable over, p. 114.

In case for the obstruction of an easement, a former joint owner in fee with the plaintiff, who had conveyed all her interest in the moiety to the plaintiff with a covenant for title, is not a competent witness for the plaintiff, nor is rendered so by indorsement under 3 & 4 Will. 4, c. 42, ss. 26, 27. *Steers v. Carwardine*, 8 C. & P. 570.

In case against a broker employed by the plaintiff to sell seed, for delivering it without payment; held, that the lighterman and ledgerman employed by the defendant in transshipping the seed, being himself liable to the plaintiff, if he did so without authority, was an incompetent witness to prove acts of the plaintiff sanctioning the delivery. *Boorman v. Browne*, 1 P. & D. 364. And see *Morish v. Foote*, 8 Taunt. 454.

3 & 4 W. 4, c. 42; p. 122.

Plea, in trespass for breaking plaintiff's two closes, &c., a public right of carriage-way; replication, denying the right; it appeared that the closes were in the lordship of T., part of the parish of L., and the roads of the lordship were proved to have been immemorially repaired by the owners and occupiers in the lordship, under an agreement, but that they

had latterly been assessed to the parish highway rates ; held, that such owners were not competent witnesses on the part of the plaintiff to disprove the existence of a public way ; as a verdict for the defendant would be evidence of reputation to charge the parish on an indictment for not repairing, and for which the witnesses would be liable to contribute ; and that the case did not fall within the 3 & 4 Will. 4, c. 42, nor were they rendered competent by 54 Geo. 3, c. 170, s. 9. *Fowler v. Port*, 7 C. & P. 792. And see *Oxenden v. Palmer*, 2 B. & A. 236. But see stat. 3 & 4 Vict. c. 26, s. 1 ; *supra*, vol. i. p. 161.

In an action on a warranty of soundness, the unsoundness being a cough, the party who had sold the horse originally to him to prove the soundness at the time of the sale to him, was held to be incompetent. *Biss v. Mountain*, 2 M. & R. 302.

In case for an injury to the plaintiff's cart, by driving against it, held that the plaintiff's servant, who was driving his cart at the time, was incompetent without a release. *Harding v. Colley*, 6 C. & P. 664. And see *Wake v. Lock*, 5 C. & P. 454.

Where an Act of Parliament adopts a new rule of evidence, the Court of Equity adopts it ; held, therefore, that the evidence of an interested witness might be read in a suit, and the entry required made. *Wheat v. Graham*, 7 Sim. 61. But see *Warren v. Taylor*, 8 Simons, 599.

Plea in trespass justifying under a right of way for persons inhabiting houses within *M.* on foot and with horses, for the purpose of carrying goods from a road called *N.* over the close, &c. unto a navigable river, it was held that an inhabitant householder in *M.* was a competent witness under 3 & 4 Will. 4, c. 42, s. 26. *Knight v. Woore*, 7 C. & P. 259.

In *assumpsit*, for clothes supplied to the defendant's servant, the servant is a competent witness for the plaintiff, on indorsing his name on the record. *Robinson v. Ferreday*, 8 C. & P. 752.

The deposition of a witness examined on interrogatories jointly interested with the defendant, may be read in evidence for the defendant, the name of the deponent being indorsed on the record, under stat. 3 & 4 Will. 4, c. 4, s. 27. *Adams v. Garrard*, 2 M. & R. 400.

Time of Objecting, p. 137.

Where a witness has been called, and after he has been dismissed by the party calling him, it is discovered from private information, that the witness is incompetent, from interest, and the party for whom he appears recalls him merely to inquire as to the existence of his interest, the objection to the incompetency will not be allowed to prevail. *Fellingham v. Sparrow*, 9 Dowl. 141.

Where after a witness for the plaintiff had been examined, it was proposed to prove that he was the real plaintiff on the record ; held, that such evidence was properly rejected, as the objection ought to have been taken on the *voir dire*. *Dewdney v. Palmer*, 7 Dowl. 177 ; and 4 M. & W. 664.

The competency of a witness may be tried either by examining him on the *voir dire*, or by evidence *aliunde*. *Wakefield's Case*, 2 Lew. Cr. Cas. 279.

Release, p. 138.

Where a witness had rendered himself liable to the attorney, held, that a release by the latter "of all fees, costs, and charges," was sufficient to render him competent. *Doe v. Allbutt*, 6 C. & P. 131.

A release executed by several commoners of their separate rights of common over the same waste, is sufficient to make them all competent witnesses in an action touching the extent of the waste, though there be only one stamp. *Carpenter v. Buller*, 2 M. & R. 298.

A release of a part-owner generally from all demands, will make him a competent witness, he not being a party on the record. *Harrison v. Gordon*, 2 Lew. Cr. Cas. 290.

Where a witness on the *voir dire* says he is released, if the release be in court, the insufficiency of the stamp may be objected to as insufficient, but if it be not in court, he may be examined without producing it. *Quarterman v. Cox*, 8 C. & P. 97.

In an action for wages by the plaintiff, against the defendant as one of the provisional committee of a joint stock company intended to be established, the defendant called as a witness a party who on the *voir dire* admitted that he was a member of such committee; held, that the company not having been established, although he might be liable as a co-contractor, he was not as a co-partner, and upon a release executed was a competent witness. *Beckett v. Wood*, 6 Bing. N. C. 380.

A butcher sued three of the directors of a Zoological Society for goods supplied for the animals. For the defence a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants; held, that the witness was not competent without being released by all the three defendants, but that he would be so if released by all three defendants, without being released by the other shareholders. *Betts v. Jones*, 9 C. & P. 199.

Where a witness (an accommodation drawer) appeared to be incompetent on the record, but stated that he had a release, and his name was indorsed on the record; it was held, that it was not necessary to produce the release. *Lunniss v. Row*, 2 P. & D. 538.

Bailiff, p. 150.

The officer sold the goods taken in execution, after notice of the bankruptcy, and paid over the proceeds; in an action against the sheriff for money had, being substantially the defendant in the action, he is not a competent witness. *Broom v. Bradley*, 8 C. & P. 500.

Where after a decree in a creditor's suit, a plaintiff moved to examine a co-plaintiff as a witness before the Master in proof of his debt; held,

that in the event of the ultimate dismissal of the suit, being liable to costs, he could not be examined. *Edwards v. Goodwin*, 10 Sim. 123.

Creditor, p. 151.

A creditor of an insolvent, in a suit by his assignees, is an incompetent witness for the plaintiff, and is not made competent by 3 & 4 Will. 4, c. 42, ss. 26, 27. *Holden v. Hearn*, 1 Beav. 445.

Criminal Proceedings, p. 152.

Where one of several defendants, in an action which had been tried, was offered as a witness on an indictment for perjury preferred against a witness in the action, held that he was not rendered incompetent merely on the ground of the debt and costs not having been paid, and that a bill in equity had been filed; but that if the witness expected that the party would be called on a similar action coming on for trial, it would be such an immediate interest as would disqualify. *R. v. Hulme*, 7 C. & P. 8; questioning *R. v. Dalby*, Peake, N. P. C. 12; and *R. v. Eden*, 1 Esp. N. P. C. 97.

Devisee, p. 156.

In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant. *Bloor v. Davies*, 7 M. & W. 235.

Inhabitant, p. 159.

Rated inhabitants held admissible to prove that the premises sought to be recovered in ejectment by parish officers, is parish property. *Doe v. Adderley*, 3 Nev. & P. 629; *S. P. Doe v. Bowles*, Ib. 632; overruling *Oxenden v. Palmer*, 2 B. & Ad. 236.

Where in replevin on a warrant to levy a highway rate, the defendant in support of his cognizance called the surveyor as a witness; held, that his incompetency on the ground of being an inhabitant was removed by 54 Geo. 3, c. 170, s. 9; held also, that a demand of the rate by one of the two surveyors appointed to the office, was sufficient. *Morrell v. Martin*, 6 Bing. N. C. 373; and 8 Sc. 688.

In ejectment for a parish house, held, that since the 54 Geo. 3, c. 170, s. 9, a parishioner having valuable property was a competent witness. *Doe v. Murrell*, 8 C. & P. 134.

And see the stat. 3 & 4 Vict. c. 26, s. 1, *supra*, Vol. I. 161.

Joint Interest, p. 161.

One of several defendants in an action *ex contractu*, suffering judgment by default, is not a competent witness for the plaintiff to prove the other defendant's liability as co-partners. *Green v. Sutton*, 2 Mo. & R. 269.

Where A., one of two partners, on entering the partnership, borrowed a sum of C., and gave her his note, which, after the dissolution, was

indorsed to *B.*, the continuing partner, and by him set off against a demand arising out of the partnership ; held, that *B.*'s liability to *C.* being independent of the result of the action between the partners, *C.* was a competent witness for *B.* to prove the loan and transfer of the note to him. *Hatcher v. Seaton*, 2 M. & W. 47.

In an action on a charter-party, a joint-owner with the plaintiff, although not a registered one, held not a competent witness for the plaintiff without cross-releases. *Jackson v. Galloway*, 8 C. & P. 480.

In *assumpsit* for repairs against a partowner, after a release, a co-part-owner was a competent witness for the defendant. *Jones v. Pritchard*, 2 M. & W. 199.

In case for infringing a patent, the purchaser of a license to use it, is a competent witness for the plaintiff. *De Rosne v. Fairlie*, 1 Mo. & R. 457.

Where upon the retirement of one partner, *A.*, the continuing one, *B.*, admitted another, *C.*, and upon the latter partnership being dissolved, *B.* became bankrupt ; held, that *B.* was not a competent witness to prove an agreement by *B.* and *C.*, to indemnify *A.* against the partnership debts of *A.* and *B.*, as tending to exonerate himself. *Warren v. Taylor*, 8 Sim. 599 ; and 1 Coop. 174. And such agreement founded on a purchase of an interest in the concern was not a mere guarantee within the Statute of Frauds.

Legatee, p. 167.

The estate of a deceased party being liable to the reasonable expenses of the funeral, and not beyond, held, that a residuary legatee was an incompetent witness to fix the whole charge of the undertaker's bill on the defendant, who ordered it. *Green v. Salmon*, 3 Nev. & P. 388.

In an action by a bond creditor of the testator against the devisee of his real estate, the question in issue being as to the signature of the testator to the will being a forgery ; held, that a party claiming, under the will, an annuity charged on the real estate, having a direct interest in the result of the suit, was incompetent. *Bloor v. Davies*, 7 Mees. & W. 235.

Overseer, p. 168.

Where an overseer was called to prove the notice of appeal ; held, that he was properly rejected, none of the statutes rendering him (a party to the appeal) competent, and there being no distinction as to mere preliminary matters. *R. v. Bath Recorder*, &c., 1 Perr. & Dav. 460.

Party, p. 168.

Under circumstances, where parties in a suit charging fraud are made defendants, who might otherwise have been examined as witnesses, the House of Lords will direct issues to be tried, and such parties examined. *Rhodes v. De Beauvoir*, 6 Cl. & Fi. 532.

Remainder-man, p. 168.

In an action by a landlord for waste, by his tenant, the landlord being tenant for life, held that the remainder-man was a competent witness, the damage going to the executor of the tenant for life, and not to the remainder-man. *Leach v. Thomas*, 7 C. & P. 321.

Trustee, p. 168.

Covenant against the representative of a deceased assignee of the lease; plea, that the assignment was made to the deceased, and S., who was still alive, issue denying such assignment; S. is a competent witness to prove that he never accepted the trust nor acted under the assignment. *Fowler v. Round*, 5 M. & W. 478.

In a suit to set aside deeds executed by a party alleged to be lunatic, a trustee, although not personally interested, but assisting in procuring the execution, is not a competent witness for the parties taking beneficially under such deeds, and the husband's competency failing, his wife must also be rejected. *Frank v. Mainwaring*, 2 Beav. 126.

Leading questions on Examination in Chief, p. 170.

The Court will not direct the name of a witness to be struck off the back of the indictment, being the brother of the prisoner, if he showed any unfair bias, he might be cross-examined by the counsel for the prosecution. *R. v. Chapman*, 8 C. & P. 558.

Leading Questions—Unwilling Witness, p. 170.

The situation in which a witness stands with respect to either party, gives no right to cross-examine, unless the witness shows himself an unwilling one, nor can evidence be given for the sole purpose of discrediting him, though others may be called to prove the facts denied, and so incidentally to discredit the witness. *R. v. Ball*, 8 C. & P. 745.

There is no distinction between civil and criminal cases as to cross-examining, with the Judge's leave, a party's own witness when unwilling. *R. v. Murphy*, 8 C. & P. 297.

Question of Skill, p. 174.

A nautical witness cannot be asked on the trial of an action for the negligent management of a ship, whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Sills v. Brown*, 9 C. & P. 601.

May refresh his Memory, p. 175.

A witness was not allowed to refresh his memory from a paper written by himself, but not contemporaneously with the transaction. *Steinkeller v. Newton*, 9 C. & P. 313.

A witness may refresh his memory from the notes of counsel taken at a former trial. *Lawes v. Reed*, 2 Lew. Cr. Cases, 152.

So a witness was allowed to refer to his deposition taken before commissioners, to refresh his memory as to a date, but not to go through the whole. *Smith v. Morgan*, 2 Mo. & R. 259.

A., a surveyor, made a survey, a report of which he furnished to his employers; being afterwards called as a witness he produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings. The report was made up from his original notes, of which it was in substance, though not in words, a transcript; held, that he might look at this printed copy of the report to refresh his memory. *Home v. Mackenzie*, 6 Cl. & Fi. 625.

Quære, whether in a criminal case the prisoner's counsel may submit a deposition to the witness on cross-examination, to refresh his memory. Denied by Parke, B. and Coltman, J., York Summer Assizes 1837. Patteson, at a former assizes, had ruled the other way, and in a subsequent case at the same assizes Parke, B. and Coltman, J. allowed it to be done.

Boundary — Verdict, p. 181.

Where the boundary between two manors is shown to be a natural boundary, upon a question as to the boundary of one of those manors and an adjoining one, the finding of the former by commissioners of boundaries is admissible in evidence, to enable the jury to say whether the continuation of the natural boundary is not also the boundary between the latter manors; held also, that although the verdict might not strictly be evidence of reputation, yet that it was a record of proceedings of such a public nature as to make it admissible. *Brisco v. Lomax*, 3 N. & P. 388.

Upon a question of boundary between two farms, evidence of the boundary of the plaintiff's farm having been given that it was the same as that of a hamlet; evidence of reputation as to the boundary of the hamlet is receivable as of a fact relevant to the issue. *Thomas v. Jenkins*, 1 N. & P. 588.

Where, upon a former issue, on a question of boundary in an action by a third party against the plaintiff, he obtained a verdict, the cause having been referred; held, that in the action by the plaintiff against the defendant, raising the same issue, the verdict in the former action was receivable as evidence of reputation, but not the award, which was only the finding of an individual; also, that an ancient presentment by the homago of a manor, in the form of a book, in which the boundaries were set out, and concluding with an alphabetical list of the parishes and tenants, but the latter part, containing the name of the parish in dispute, mutilated, was admissible as evidence of the reputed boundary, the part relating to the boundary being perfect. *Evans v. Rees*, 2 P. & D. 627; and 10 Ad. & Ell. 151.

A perambulation by the lord, including the *locus in quo*, was held to be admissible as evidence of assertion of ownership, although no person was present on the part of the plaintiff, nor any proof given that he knew of the perambulation. *Woolway v. Rowe*, 1 Ad. & Ell. 114.

Custom—Reputation, p. 181.

In an action of trover, by the lessee of the tolls of tin mines held under the Duchy of Cornwall, upon the question of admissibility of the ancient answers of conventional tenants of the manor, stating the rights of the lord; held, that being made by persons under whose estates the minerals lay, with respect to which the alleged customs existed, they were sufficiently connected with the subject to make their declarations evidence as reputation of the custom; but not where they stated facts only; and reputation is admissible, although not supported by usage, nor confirmed by proof of facts; held also, that the declarations of the lord of the manor, as to the *extent* of his rights, were inadmissible; *aliter*, as to the extent of the wastes only; where a lease had been surrendered, and was entirely at an end, and a new grant made; held, that any admission by the grantor prior to such latter grant, respecting the subject granted, was evidence against the grantee, who claimed by title subsequent under the grantor. *Crease v. Barrett*, 1 Cr. M. & R. 919.

To negative, &c.

Reputation being admissible evidence to establish a public right, is equally admissible to negative a right: upon a question, therefore, whether land on a river was a public landing-place or not, reputation that it was the private landing-place of the defendant and his predecessor, is admissible. *Drinkwater v. Porter*, 7 C. & P. 181. And see *R. v. Sutton*, 3 N. & P. 569.

Lis mota, p. 182.

Declarations of deceased members of a family, in matters of pedigree, are inadmissible if made after the state of facts had arisen on which the claim was founded, which for that purpose was to be deemed the commencement of the *lis mota*. *Walker v. Beauchamp*, 6 C. & P. 560.

Not Examined in Chief, p. 186.

A witness called under a mistake of counsel, as to his being able to speak to a transaction, is not liable to cross-examination, though sworn, if the mistake be discovered before any question is put. *Wood v. Mackinson*, 2 Mo. & R. 273.

Where a witness on the bill was tendered, but not examined by the counsel for the prosecution, it was held that he might be cross-examined after being examined for the prisoner. *R. v. Harris*, 7 C. & P. 581.

Where a witness called and sworn, and having answered an immaterial question, was stopped by the Judge, it was held that this did not give a right to cross-examine him. *Creevy v. Carr*, 7 C. & P. 65.

Cross-examination, p. 186.

Upon a joint plea of not guilty, the counsel of each defendant is not allowed either to cross-examine or address the jury separately. *Scale v. Evans and another*, 7 C. & P. 593. *Qu.* And see tit. ARGUMENTS OF COUNSEL.

Witnesses to character should only be cross-examined as to some distinct matter intended to be charged. *R. v. Hodgkiss*, 7 C. & P. 298.

In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him. *Downing v. Butcher*, 2 M. & R. 374.

A witness may be asked as to the circumstances on which he founded a particular belief. *R. v. Murphy*, 8 C. & P. 297.

Separate Examination, p. 188.

Either party, at any period of trial, may require witnesses to be ordered out of Court. *Southey v. Nash*, 7 C. & P. 632.

Cross-Examination as to Collateral Facts, p. 189.

A witness cannot be examined as to what another witness said on other occasions than that which is the subject of the trial. *R. v. St. George*, 9 C. & P. 483. What a witness has said at other times, is only matter for the cross-examination of the witness himself. *Ib.*

A witness to character cannot be contradicted as to facts collateral to the issue upon the record. *Lee's Case*, 2 Lew. Cr. Cases, 154.

Facts collateral to the issue upon the record cannot be given in evidence to discredit a witness. *Harrison v. Gordon and others*, 2 Lew. Cr. Cases, 156.

Counsel may, on cross-examination, inquire as to a fact, although appearing to be irrelevant, if he undertake to show, by other evidence, that such fact is relevant to the issue. *Haigh v. Belcher*, 7 C. & P. 389.

The daughter, in an action for seduction, denies, on cross-examination, that she knows *M. N.*, not having been cross-examined as to statements by her relating to *M. N.*, evidence of the fact is inadmissible. *Carpenter v. Wahl*, 3 P. & D. 457; 11 Ad. & Ell. 303.

Where upon cross-examination of the witness, with the view of discrediting him, he was asked if he would swear he had not said so and so, he replied he would not swear; held, that the party could not be called to contradict him, unless he swore positively to the fact. *Long v. Hitchcock*, 9 C. & P. 619.

A Witness is not compellable, &c., p. 191.

But in case for a libel on the plaintiff as a high constable, purporting to be a memorial from the vestry of *P.*, the vestry clerk cannot refuse to produce the vestry books. *Bradshaw v. Maples*, 7 C. & P. 612.

Cross-examination as to Writings, p. 199.

Where a paper is put into a witness's hand, and his cross-examination upon it entirely fails, the opposite counsel is not entitled to look at it. *R. v. Duncombe*, 8 C. & P. 369.

A letter having been put into a witness's hand, on cross-examination, to read, and questions founded on it, a counsel is not bound to have the letter read until after he has addressed the jury. *Holland v. Reeves*, 7 C. & P. 36.

As to cross-examination in criminal cases in respect of depositions, see the resolutions of the Judges, *supra*, i. 429, 1 Ry. & M. 495; 7 C. & R. 676.

Counsel can only cross-examine from depositions, by making them evidence, and giving the right of reply; but Judges are not bound by the resolutions adopted upon the passing of the Prisoners' Counsel Bill, and may in their discretion question the witness as to the discrepancies: where cross-examinations of witness are not returned in the depositions by the magistrates, counsel may cross-examine as to them. *R. v. Edwards*, 8 C. & P. 26.

A witness cannot be asked as to what he did or did not state before the magistrate; the deposition must be first put in, and read over to him. *R. v. Taylor*, 8 C. & P. 726.

Where some of the statements made by the prosecutrix, on a charge of rape before borough justices, were taken down, but not signed nor read over, others not, and the prisoner was discharged, but afterwards again taken before the county justices and committed for trial; held that she might be questioned as to the statements so at first made by her, without producing the paper. *Reg. v. Griffith*, 9 C. & P. 746.

Where a party made an affidavit, used on a motion for a new trial, and an office copy was upon summons admitted to be a true copy, it was held, that the party being called as a witness on the second trial, might be cross-examined upon the office copy, without producing the original affidavit. *Davies v. Davies*, 9 C. & P. 253.

Where depositions have been taken and lost, a witness may be cross-examined from copies. *R. v. Shellard*, 9 C. & P. 277.

A prisoner's counsel has no right to ask a witness for the prosecution, whether he has always told the same story, the question ought to be, "Have you always said so except before the magistrates?" *Ib.* And see *R. v. Holden*, 8 C. & P. 606.

In a case of rape it appeared that the prisoner had been taken before the mayor of N., charged with this offence, and that the prosecutrix was then sworn and her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates; held, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N. without the production of that which was taken down in that examination. *R. v. Griffiths*, 9 C. & P. 746.

A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the

trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and after reading the deposition (which preceded his own, which he had signed) he stated that he believed that that was the deposition which was read over to the witness; this deposition may be read to the witness by the officer of the court for the Judge to examine her upon it. *R. v. Haller*, 9 C. & P. 748. And see further as to cross-examination, from the contents of an affidavit made by the witness, *The Attorney-general v. Bond*, 9 C. & P. 189.

Re-examination, p. 208.

Where the plaintiff's witness had in chief stated the defendant to be the party with whom he contracted on behalf of the plaintiff, which was contradicted by the defendant, the defendant having afterwards come into Court; it was held, that the witness could not be re-examined to speak more positively as to identity. *Roe v. Day*, 7 C. & P. 705.

The defendants having cross-examined the plaintiffs' witnesses, to show a custom in the Canada trade to carry a deck cargo, it is competent to the plaintiffs, in order to rebut the inference sought to be raised, to inquire whether, where the deck cargo was lost or thrown overboard, it was not usual for the shipowner to pay for it. *Gould v. Oliver*, 2 Scott's N. R. 241.

The counsel calling a witness, who gives adverse testimony, cannot, on re-examination, ask whether the witness had not given a different account to the attorney. *Winter v. Butt*, 2 M. & R. 357.

The plaintiff's brother (examined on interrogatories) was cross-examined as to a conversation which the plaintiff represented himself to have had with the defendant relative to the matter in question; nothing of importance having been elicited, he was required, on re-examination, to state the *whole* of the conversation; he did so, and thereby proved an admission by the defendant of a material fact: it was held, that the evidence was legal, but that being mere evidence of a statement made by the plaintiff, not on oath, it was entitled to little consideration by the jury. *Gwyn v. Sir W. Houston*, 2 Scott's N. R. 548.

On the trial of *A.*, for attempting to discharge loaded arms at *B.*, *B.*, with a view to discredit his evidence, was cross-examined as to whether he had not used violent language towards his father, which he admitted; on re-examination, *B.* may be asked as to how his father had acted towards him before he used the language that he had been cross-examined to. *R. v. St. George*, 9 C. & P. 483.

Laying ground for contradiction, p. 213.

The general rule is, that, if a party to a cause wishes, on the trial, to impeach an adverse witness by proof of his having used certain expressions, the witness himself must first be asked whether he used them. Where the witness's moral character is relevant to the issue, such expressions may, it seems, be proved without the previous inquiry, if they tend

merely to disgrace the witness by showing that he has made unbecoming declarations. But even if they be of such a nature, the introductory question must not be dispensed with if they tend likewise to contradict some part of the witness's evidence. Therefore, in an action against *A.* for seducing and getting with child the plaintiff's daughter, which facts the daughter proves, the defendant cannot give evidence that she has talked of *B.* as her seducer and father of her child, unless she be first asked in cross-examination whether she ever used those expressions. *Carpenter v. Wall*, 11 A. & E. 803.

A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it, of his having done so. *Long v. Hitchcock*, 9 C. & P. 619. But see *Crowley v. Page*, 7 C. & P. 701; *supra*, vol. i. p. 213.

Evidence in contradiction, p. 214.

Evidence of statements made by a witness on other occasions relevant to the matter in issue, and inconsistent with his testimony on the trial, are always admissible, whether parol or written; in the former case he must be asked whether he ever used the expressions suggested to a party named, or under other circumstances, mentioned sufficient to fix the occasion; in the latter the writing must be put in his hand, and he may be asked if it is in his handwriting; if he admits the conversation or writing, no other evidence of it need be given. *Crowley v. Page*, 7 C. & P. 789.

Evidence in contradiction—the particular Words, &c. p. 214.

In the case of *Hullett v. Cousins*, 2 Mo. & R. 238, it was ruled that where a witness on cross-examination denies having made particular statements, and a witness is called to prove he did, the particular words cannot be put, but he must be asked what passed.

A Party not allowed to discredit his own Witness, &c. p. 215.

Where a party has placed a witness in the box as a witness of credit, he cannot be impeached by calling witnesses to show that he has given a different account, and it makes no difference that the fact is elicited upon cross-examination. *Holdsworth v. Mayor of Dartmouth*, 2 Mo. & R. 153.

Whose Name was indorsed on the Indictment, p. 217.

The general result of the authorities regarding the practice of calling a witness whose name is indorsed on the indictment, seems to be, that as stated in the text, it is competent to the Judge to call the witness, and as it seems, to the prosecutor's counsel to contradict the witness, and that the calling such a witness is discretionary on the part of the prosecutor's counsel. The counsel for the prosecution declined to call a witness bound over to the assizes, and whose name was on the bill. Lord Lyndhurst held the prosecutor was not bound to call the witness, but called the witness on the part of the Crown. *R. v. Maddox and others*, Lancaster Sum. Ass. 1834.

The calling of a witness, whose name is on the back of the indictment, for the other side to cross-examine, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and it seems that the same discretion may well be exercised in misdemeanor. *R. v. Vincent*, 9 C. & P. 91.

But see *R. v. Jordan*, 9 C. & P. 119, where it is said to be incumbent on the prosecutor to put every witness examined before the grand jury into the box, whether his evidence be favourable or otherwise.

In criminal cases, though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet, *semble*, that it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth. *R. v. Bull*, 9 C. & P. 22.

Public Judicial Document, p. 223.

Where a plan has been filed in support of a motion at the instance of a particular party, and which has been disposed of, the Court will not allow that plan to be taken off the file at the instance of the same party, in order to enable him to make his defence to another proceeding. *Price v. Seeley*, 8 Dowl. 653.

Gazette, p. 223.

A declaration alleged the division of a parish into several distinct parishes by order of the King in Council, under 58 Geo. 3, c. 45; held, that the allegation could not be proved by the production of the Gazette containing a copy of such order.

Public Books, &c. p. 228.

To prove the acceptance of stock, and identity of the party, a copy of the entry, and evidence of the hand-writing, by a party who had inspected the entry itself in the bank books, is admissible, without producing the books themselves. *Mortimer v. M'Callan*, 6 M. & W. 58.

Public Acts of the Crown, p. 235.

In the absence of any patent of creation to support a claim to a peerage, an instrument under the great seal of Scotland, produced from the repositories of the heir of entail of the family property, was held to be admissible as evidence of the creation of such peer, with limitations in tail male, as therein stated. *Huntley Peerage*, 4 Cl. & F. 349.

Journals of the House of Lords.

An entry in the Journals of the House of Lords, reciting the limitations in a patent of peerage, was admitted by the Committee of Privileges, without producing the patent itself. *Lord Dufferin's Case*, 4 Cl. & F., p. 568.

Book of Duchy Officer, p. 235.*

In an action to try whether the Queen, in right of the duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff

insisting that in former times an officer of the duchy, called the feodary, discharged the duties of coroner; held, that a manuscript book, written by one *J. S.* (a feodary in the reign of Queen Elizabeth), and purporting to contain an account of the duties of his office, and precedents relating thereto, was not receivable in evidence for the plaintiff, who claimed to be duchy coroner, although such book had been kept in the duchy office and referred to there as a book of authority. *Jewison v. Dyson*, 2 M. & R. 377.

Note (x) continued, p. 237.

It has been frequently asserted that this valuation was too low. See *Weston v. Voughton*, cited Phill. on Ev. 588, note (2), in which Lord Tenterden observed that it had been generally supposed that Pope Nicholas's valuation was too low. See also *Chapman v. Smith*, 2 Ves. Sen. 506; *Bree v. Beck*, 1 Cr. & J. 267; 6 Price, 483.

Note (c) continued, p. 337.

See *Roe v. Ireland*, 11 East, 283, where Lord Ellenborough observes upon the extreme accuracy of the Parliamentary survey. *Blundell v. Howard*, 2 M. & S. 294: where the same learned Judge observes that the silence of that survey as to a modus affords strong evidence against its existence.

Commission could not be found, p. 238.

But upon a question of the *locus in quo*, being parcel of and within a manor, formerly part of the Duchy of Lancaster, a document produced from the Duchy-office, purporting to be a survey, temp. Eliz., by *J. N.*, deputy to the surveyor-general, and signed by persons described as jurors of the Court of Survey, who presented the boundaries, but there was no inquisition nor commission for making it, although there appeared an order by the Queen for payment for making it, was held to be inadmissible. *Evans v. Taylor*, 3 Nev. & P. 174.

Where a document purporting to be an exemplification of a commission, temp. Eliz., was produced from the proper custody, but the seal was gone from the usual slip of parchment annexed, the Court held that a complete exemplification might be presumed. *Beverley v. Craven*, 2 M. & R. 140.

Place of Deposit, p. 239.

Where, on a former reference of the same cause, the defendant had consented to admit in evidence a will in the custody of *B.*, a party who appeared to be his mortgagee, and on the trial afterwards the plaintiff's attorney producing the will, admitted that he had received it from *B.*, was held to be sufficient *prima facie* evidence of proper custody to render it admissible. *Doe v. Owen*, 8 C. & P. 751.

Public Registers, p. 243.

The rule as to proof of marriages, births, &c. by the registers in the absence of living witnesses, held not to apply to Ireland, where such have

not been duly kept; and copies therefore of instruments, and evidence of reputation, were received after proof of no registers found after proper search. *Vaux Peerage*, 5 Cl. & F. 526.

The 6 & 7 W. 4, c. 86, s. 20, makes it imperative on the parties named to give information to enable the registrar to make a registry of birth, upon his requesting it to be given, and an indictment lies against the party refusing, although the child may have been already registered in the parish registry. *R. v. Price*, 3 P. & D. 421; and 11 Ad. & Ell. 727.

Where the Act for inclosing the Bedford Level directed that all conveyances of the allotments to the then Earl of B., or any part thereof, entered with the registrar, should have the same force and effect as if enrolled in one of the King's courts of record; and that no lease of, or charge thereout, should be of force but from the time of its being so entered with the registrar; held that the conveyances, though not registered, were nevertheless valid, except as to entitling the grantees to the privileges conferred by the Act. *Willis v. Brown*, 10 Sim. 127.

As to non-parochial registers made evidence, and the mode of giving those registers and extracts from them in evidence, in the courts of common law, and at the sessions, and the places of deposit of the registers of the Jews, the India registers, and the registers of British embassies and factories abroad, see 3 & 4 Vict. c. 92.

An examined copy of the register of marriages kept in Barbadoes is admissible. *Cood v. Cood*, 1 Curt. 755.

A Fleet register of marriages is not evidence for any purpose. *Doe v. Gatacre*, 6 C. & P. 578.

Commissioners' Books, p. 251.

A Dock Act requires that the directors shall keep a regular minute and entry of the orders and proceedings at every meeting of the directors, which shall be signed by the chairman at each respective meeting. A signature by the chairman at a subsequent meeting, at which the minutes of a former meeting were read over and confirmed, is a sufficient compliance with the Act. *Southampton Dock Company v. Richards*, 1 Scott, N. S. 219.

Public Histories, p. 251.

Statements of cotemporary historians are inadmissible in evidence, nor is a copy from the minutes of the Committee of Privileges of an inscription in a churchyard, then admissible in another case. *Vaux Peerage*, 4 Cl. & F. 526.

Judgment a Bar, p. 256.

Where a father during his son's (an infant) absence abroad commenced an action for crim. con., as his *prochein amy*, held that he was entitled to do so, and that the verdict would be a bar to any action by the son on attaining full age: the *prochein amy* is a guardian appointed by the Court. *Morgan v. Thorne*, 9 Dowl. 228.

Claiming in Privity, p. 258.

Where *A.* after 39 years' possession by his father *S.* and himself, mortgaged to *S.* in fee, and one claiming as heir in tail male brought ejectment, and on reference to a barrister an award was made in his favour, it was held that on an action by *S.* the award was *res inter alios*. *Doe v. Webber*, 1 Ad. & Ell. 733; 3 Nev. & M. 746; although *S.* attended as a witness and afterwards laid demises in the name of the mortgagor, *Ib.*

Manner of the Adjudication, p. 265.

A decree is not evidence unless final. *Pim v. Curell*, 6 M. & W. 234.

The determination of the Privy Council to advise the Crown to grant a petition for a charter under the stat. 1 Vict. c. 76, s. 49, is not conclusive as to its validity. *Rutter v. Chapman*, 8 M. & W. 1.

The judgment of a foreign court is not binding if constituted by persons interested in the matter in dispute. *Price v. Dewhurst*, 8 Sim. 279.

The Judge of the Belper Court of Requests erected by 2 & 3 Vict. c. 18, has no power to alter at one Court without consent a judgment in favour of the defendant into a judgment of nonsuit pronounced by mistake at another, and if he does and the plaintiff proceeds in a second plaint for the same cause of action, the latter proceedings are a nullity, and the defendant may so treat them, and the Court of Queen's Bench will set them aside even after verdict. *Webster v. Mason*, 8 Dowl. P. C. 705.

The proceedings by foreign attachment in the Tolzey court, Bristol, as set out upon error, appearing to have been commenced without issuing and returning a writ of summons; this Court set aside the judgment therein, at the instance of the garnishee. *Bruce v. Wait*, 1 Scott, N. S. 81.

Neither the issue delivered, nor the Nisi Prius record in an action between the same parties, is admissible as proof of the facts stated on the pleadings, where no judgment had been had. *Holt v. Miers*, 9 C. & P. 191.

Decree of Alimony, Proof of, p. 302.

A decree of the Court of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit. Where a suit is removed by appeal from the Consistory Court to the Court of Arches, the judgment of the Court of Arches is not admissible in evidence, without showing that Court to be duly in possession of such suit by producing the proofs of appeal, viz. the transcript of the proceedings sent from the Court below. *Leakey v. Marquis of Westmeath*, 2 Mo. & R. 394.

Inquisition, p. 306.

Where the inquisition alleged the offence on a day not arrived, by mistakenly using the words "year aforesaid," it was quashed. *R. v. Mitchell*, 7 C. & P. 800.

On a coroner's inquisition, several jurors being of the same name, it is not necessary to distinguish them by their trades or places of abode.

Where it alleged that parties were feloniously present, then and there aiding, &c.; held insufficient, as the word "feloniously" only applied to the word "present," and not to the latter words; but want of time and place to the concluding averment, "and so the jurors, &c." was held not to be material. *R. v. Nicholas*, 7 C. & P. 538.

If the jurors sign by the initial Christian names, as they usually do, it is sufficient if their names appear at length in the body. *R. v. Brownlow*, 3 P. & D. 52; and 8 Dowl. 157.

Deposition, Evidence of Reputation, p. 319.

In an action for infringement of a ferry, depositions in a suit in the Duchy Court, made after interlocutory orders, for preserving the *status quo*, until a final decision upon the rights of the parties was had, no final decree ever being made, is inadmissible as evidence of reputation: a judgment of the matter directly in issue, although between other parties, being evidence not of any specific fact existing at the time, but of an adjudication of a competent tribunal upon the state of facts and the question of usage at that time; but an interlocutory order of such a nature involves no judgment upon the rights of the parties. *Pim v. Curell*, 6 M. & W. 234.

Pleadings and depositions, and a decree in a former suit, the same subject being in issue, are admissible, as showing the acts of parties who had the same interest in it as the plaintiff. *Lorton, Viscount, v. Lord Kingston*, 4 Cl. & F. 269.

Examination of Witness, 1 Will. 4, c. 22, p. 323.

It is no ground of objection to a rule for examining a witness *vivâ voce* before the master, pursuant to 1 W. 4, c. 22, s. 4, that it is suggested that he is unwilling to submit to cross-examination, or that he is the son of the party applying, if he appears to be independent of his father's influence. *Carruthers v. Graham and others*, 9 Dowl. 947.

Examination of Witnesses on Interrogatories, p. 323.

It is sufficient to obtain a commission, that the witnesses are out of the jurisdiction, and it is immaterial that the action is of a criminal nature. *Norton v. Lord Melbourne*, 3 Bing. N. C. 67; 3 Sc. 398; and 5 Dowl. 181.

It is not necessary to state the names of the intended examiners on applying for a rule for a commission, as it may be done when the rule is discussed. *Fearon v. White*, 5 Dowl. 713.

The commission directed to judges of a foreign court need not require the commissioners to be sworn. *Ponsford v. O'Connor*, 5 M. & W. 673; and 7 Dowl. 866.

An order for a commission to examine witnesses abroad was allowed to be extended to liberty to cross-examine *vivâ voce*, such examinations to be reduced into writing, and returned with the commission. *Poll v. Rogers*, 3 Bing. N. C. 780; and 5 Dowl. 632.

Where the commission required that when the examinations were taken the same should be sent; held, that copies taken by the foreign Court of Commerce, to whom the commission had been directed, and certified by their officer, and transmitted under the seal of the Court, could not be read. *Clay v. Stephenson*, 7 Ad. & Ell. 185.

A witness in imminent danger of death examined *de bene esse*, is living, and capable of being examined at the hearing of the cause, such examinations are inadmissible. *Weguelin v. Weguelin*, 2 Curt. 263.

A rule to examine witnesses abroad will be granted, if the names of some of the witnesses proposed to be examined are mentioned in the affidavits, although the names of others are not. *Beresford v. Easthope*, 8 Dowl. P. C. 294.

A rule to examine on interrogatories a witness alleged to be confined to her bed by infirmity, refused without the affidavit of a surgeon stating the nature of the complaint, and belief that the witness would never be able to attend the trial. *Davis v. Lowndes*, 7 Dowl. 101. And see *Desmond v. Vallance*, 7 Dowl. 590.

An examination of a witness, *vivâ voce*, before the master, under the 1 W. 4 c. 22, cannot be taken until after issue joined. *Mondell v. Steele*, 9 Dowl. 812.

The Court will grant a rule in the first instance for quashing a commission to examine witnesses pursuant to 1 W. 4, c. 22, s. 4, where the commission has been granted, and the application has been made at the instance of the plaintiff. *Hodges v. Daly*, 8 Dowl. 308.

The defendant obtained an order for postponing a trial until the sitting after Hilary term, and for a commission to examine witnesses abroad, the commission was not returned until the following November; held that the evidence taken under it was inadmissible. *Steinkeller v. Newton*, 8 Dowl. P. C. 579.

In an action at the suit of the Crown, the Court has no power to issue a mandamus for the examination of witnesses in India. *R. v. Wood*, 9 Dowl. 310.

Proof of Deposition on Interrogatories, p. 324.

In order to let in the deposition of a witness examined on interrogatories, his absence must be shown by some one who can speak to the fact of his own knowledge; proof of inquiries made at the residence of the witness and of answers given is not enough. *Robinson v. Markes*, 2 Mo. & R. 375.

The depositions of a witness examined on interrogatories are admissible, though it appeared that on his examination he referred to papers which he refused to allow the commissioners to see. *Steinkeller v. Newton*, 2 Mo. & R. 372.

Identity of Parties, p. 326.

Where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limi-

tations in it were stated in Court by the defendant's counsel; held, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff, in a second ejectment against another party. *Doe v. Ross*, 7 M. & W. 102.

But *qu.* whether such evidence would not have been receivable had the parties been the same. *Ib.*

It is no objection at Nisi Prius to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the Court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller v. Newton*, 9 C. & P. 313.

Where a witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced; it was held, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English courts, of compelling the production of the letter.

Pleadings not Evidence, p. 337.

Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statement in it, in his address to the jury. *Ingram v. Lawson*, 9 C. & P. 326.

Entry or Declaration by a Third Person, p. 346.

In the case of *Furdson v. Clegg*, ext. after Michaelmas Term 1841, the question was much discussed whether there was any substantial distinction between a written entry and an oral declaration by a witness of the fact of his having, as the agent of another, received rent in respect of particular land. The declaration was made by a yeoman who had been employed for two years by a steward to collect the rents, and the declaration to the steward proposed to be given in evidence was, "M. N. paid me the half year's rent, and here it is." The Court heard the question argued, 1st. on the admissibility of the evidence as being a declaration against interest, and afterwards whether it was admissible as a declaration made in the course of discharging a duty. The Court took time to consider, intimating a present opinion in favour of the admissibility of the evidence.

Parol evidence is admissible of declaration made by a devisee to prove that she was merely a trustee. *Strode v. Winchester*, 1 Dick. 397, against interest.

Entry accompanying an Act, &c. p. 351.

Upon an assignment of perjury in an answer in Chancery, by the de-

defendant, it being material whether an annuity payable to the defendant or *B.* his trustee, had been paid; held, that the clerk of *B.* might be asked, "at the time he received money from *B.* to pay in at his bankers, what did he say about the money?" held, that the answer was receivable as a declaration made by an agent, acting at the time within the scope of his authority. *R. v. Hall*, 8 C. & P. 358.

Where the defendant's son was alleged to have warranted a horse, as agent to the defendant, and, to prove the authority, evidence was offered of the son's declaration to a stranger, held inadmissible, as not made in the course of any bargain and sale for the horse. *Allen v. Denstone*, 8 C. & P. 760.

Declaration by an Owner not Evidence for one who claims through him against one who does not claim in Privity, &c. p. 354.

Declarations by persons holding negotiable securities under the same title are admissible, but the right of a party holding under a good title is not to be cut down by an acknowledgment from the owner that he had no title. Per Parke, *B. Woolway v. Rowe*, 1 Ad. & Ell. 114.

Declaration by an Intestate as to Property.

Where the intestate had long lived with the defendant, and owed her for five years' rent, and it was proved that some time before his death he had said that she should have what property he had on the premises for what he owed, and the jury having found a verdict for the defendant, the Court held that there was a sufficient delivery if the jury believed the witness as to the declaration, and refused to disturb the verdict. *Royston v. Hankey*, 2 M. & Sc. 381.

Declaration by one no longer interested.

Where a party, after a post-nuptial settlement, mortgaged the same premises; held that as his declarations could only bind him whilst the interest remained in him, his declarations as to the consideration paid by the subsequent purchaser were inadmissible against the claimants under the settlement, which would be to enable him to cut down his own previous acts. *Doe v. Webber*, 3 Nev. & M. 586.

Entries by Parties, p. 355.

A letter written by a party can only be made evidence for him in his own cause as a notice or demand. *Richards v. Frankum*, 9 C. & P. 221.

So as a general rule an entry by a party or his agent not after his death admissible in favour of his representative. An exception obtains in the case of a vicar or rector.

A bill is filed by a vicar for tithes, an account given in by a sequestrator to the bishop in the year 1600, containing a charge and discharge, is evidence for the vicar. *Finch v. Messing*, cited in *Sharp v. Lec.*, 2 J. & W. 472.

Entry by a Steward, p. 357.

Where the entry of a deceased steward showed the balance in his own

favour, held that it did not affect the admissibility of a particular entry charging himself. *Williams v. Greaves*, 8 C. & P. 592.

Entries made by a steward in his books in his own favour, and unconnected with other entries against him, held not admissible as evidence of the facts stated in them. *Knight v. Marquis of Waterford*, 4 Younge & C. 284.

Upon a covenant in a lease of a colliery for payment of one-third of the money arising from the sale of coals raised and sold, coupled with another to keep true accounts of all coals raised, and to deliver true copies to the lessor; held, that the calculation must be made on the amount of coals sold, and not of the money actually received; held also, that the accounts kept by the account keeper appointed by the parties working the colliery were, after his death, admissible in evidence, as charging himself, and as admissions made by the lessee's agent. *Edwards v. Rees*, 7 C. & P. 340.

Entry in course of Business, p. 359.

On an indictment against the keeper of Newgate for refusing to receive parties committed by Middlesex justices on misdemeanors, it being the course of business of the office of the city solicitor to indorse notices and orders when served, the Judge (although there were no corroborating circumstances, received the indorsements as evidence of service, the solicitor, the clerk, and the keeper being all dead. *R. v. Cope*, 7 C. & P. 720.

By an Agent, &c. p. 361.

In the case of *Rudd v. Wright*, cor. Lord Lyndhurst, July 11, 1832 (cited Phill. on Ev. 328. 8th Edit.), a survey made for Trinity College, Cambridge, impropiators of the living of which the plaintiff was vicar, stated certain closes as titheable to the vicar, Lord Lyndhurst said, that although this would be evidence against the College in a suit between them and the vicar, it would admit of consideration whether it was evidence against a third person. He held, that a marginal note which stated that the closes specified as titheable to the vicar formed part of a certain close mentioned in the terriers, was not admissible, being in the nature of a collateral and incidental observation made by the party who procured the survey. It is observable, that independently of this objection, there appears to have been no sufficient ground for admitting what, as against a land-owner, was but a declaration by the College that the incumbent of their own living was entitled to tithe in kind out of particular land.

In the case of *Doe v. Vowles*, 1 Mo. & R. 261, the question was, whether the defendant had enjoyed a possession adverse to the mortgagee for more than 20 years. To prove that the mortgagee had interfered with and repaired the premises, a carpenter's bill debiting the mortgagee, with a receipt thereon in the carpenter's writing, for work done on the premises, was offered in evidence. The carpenter was dead, and the bill and receipt came from the papers of the mortgagee in the hands of his representative. Littledale, J. rejected the evidence, saying "the cases

have gone far enough. There would be no limit if such a paper as this were admitted." It is to be observed, that in this case there was no evidence *aliunde* to show that the carpenter in fact ever did the work; the foundation was wanting upon which the reception of such entries seems in other cases to have been built; and in the case of *Higham v. Ridgway* (as is observed in a note by the learned reporters of *Doe v. Vowles*), Lord Ellenborough in giving judgment relied on the fact that the work had been done to which the entry of charges related.

Ejectment for a cottage, alleged to be a parish house, and into which paupers had been placed by the parish officers, which the lord of the manor alleged (but without proof) he had done jointly with them, it appeared that the lord had induced the pauper in possession to leave, and had put the defendant in; held, that a private entry of a deceased builder of repairs done, and paid by the lord, was inadmissible; held also, that the lord having come in under a person occupying under the parish, was estopped from disputing their title. *Doe d. Haden v. Burton*, 9 C. & P. 254.

As to what facts admissible, p. 363.

A. and *B.* having joined in a note to *C.*, the amount of which was paid by *A.* on indorsement by *C.* (since deceased) of the receipt of the money as originally advanced to *B.*, is evidence as well of the payment by *A.* as of the liability of *B.* to *A.* *Davies v. Humphreys*, 6 M. & W. 153.

In the above case, Parke, B. observed, that the authorities had gone far beyond the extent of making a memorandum of receipt or payment to be evidence of the mere fact of payment, and that the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it, as in the cases of *Higham v. Ridgway* and *Doe v. Robson*; and that, without over-ruling those cases, the Court could not hold the memorandum in question not to be evidence of the truth of the whole statement in it, and consequently to be evidence not merely of the payment of the amount by *A.* to *C.*, as for a debt due from *B.* as principal, but also of the fact that the debt was due from *B.* to *A.* The effect of the evidence was for the jury.

In trover for plates, etchings, and engravings; plea, that they were detained upon an agreement as a security for a sum due from plaintiff, and issue as to the sufficiency of a sum tendered in discharge of the lien; held, that the amount of the sum tendered was a material fact to be traversed, and was not the less material by being laid under a *videlicet*; the plea also alleging a retainer of the defendant on divers days and times to execute particular works, whereby the plaintiff became indebted, &c., and that the defendant detained the plates, &c. as a security; held, that a replication, alleging that the work was done under distinct contracts, was not an immaterial issue; held also, that an entry by the plaintiff's deceased clerk, admitting the receipt of a sum for the purpose of the tender, and going on to say that it was not accepted, was admissible as

an entry of a fact within the party's knowledge, and subjecting him to a pecuniary demand. *Marks v. Lahee*, 3 Bing. N. C. 408; and 4 Sc. 137.

By a deceased Occupier, p. 365.

In ejectment the declarations of a deceased occupier as to the party of whom he held them as tenant, are admissible. *Doe d. Marjoribanks v. Green*, 1 Gow's C. 227.

Statements of a deceased occupier as to the party of whom he held, being admissible to cut down his own title, held admissible on a writ of right by a party claiming through the same party, whatever might be their effect. *Carne dem. Nicholl ten.*, 1 Bing. N. C. 430.

The question being whether Scorhill was parcel of the plaintiff's estate, or part of the waste of Morrall, the plaintiff having no other interest than the right to turn on cattle, evidence was admitted of declarations by a former owner and occupier of the plaintiff's estate, that he had no right to enclose the Down (the *locus in quo*), although the owner was living and in Court. This was admitted on the ground of identity of interest. *Woollway v. Rowe*, 1 Ad. & Ell. 114.

Proof by Attesting Witness when necessary, p. 370.

Where a deed executed by a corporation contained a memorandum written on the paper to which the seal was affixed, purporting that it was sealed by order of, &c., and subscribed "*A. B.*, secretary;" held not to be an attestation, but merely a memorandum that the act was done by the order, &c. *Doe d. Bank of England v. Chambers*, 4 Ad. & Ell. 410; and 6 N. & M. 539.

Where *A.*, an equitable mortgagee, gave a schedule of the deeds deposited, describing one as executed by *B.*; in ejectment by the mortgagee against a party coming in under the mortgagor; held, that the subscribing witness ought to be called. *Doe v. Penfold*, 8 C. & P. 536.

Where secondary evidence, by proof of the copy of an original deed, not produced, is admitted, it is unnecessary to call the attesting witness, although the original appears to have been subscribed by one. *Poole v. Warren*, 3 Nev. & P. 693.

A subscribing witness who resides in Dublin is out of the jurisdiction of the Courts of this country, so as to let in proof of his handwriting, the same as if he were dead. *Doe d. Counsell v. Caperton*, 9 C. & P. 112.

If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if *non est factum* be pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness. *Cronk v. Frith*, 9 C. & P. 197.

Deed, Proof by attesting Witness, p. 373.

A party shortly before his death executed an irregular deed of gift, and delivered it before the attesting witnesses as his last act and deed, but upon its being suggested that if delivered to the party it would take the pro-

party from him in his lifetime, he desired a third party to keep it, and not to give it to the grantee in his lifetime; held that the delivery was complete; held, also, that if a party execute a deed, supposing it to operate in one way, whereas it really operated in another, such instrument would be invalid. *Doe v. Bennett*, 8 C. & P. 124.

Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it. *Burling v. Paterson*, 9 C. & P. 570.

Secondary Proof in Absence, &c. p. 379.

A deed executed in the presence of a subscribing witness proved to be abroad at the time of the trial, is admissible, on proof of the witness's writing, notwithstanding the power to examine on interrogatories under 1 W. 4, c. 22, s. 4. *Glubb v. Edwards*, 2 Mo. & R. 300.

It is extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity. A will was attested by the signature *T. B. V.*, and the marks of *C.* and *M. D.* All these were dead; the signature of Mr. *V.* was proved, and the daughter of *C.* and *M. D.* proved that they were both dead, and that when alive they lived near the testator, no other persons of those names living anywhere in that neighbourhood; and this witness also stated that *M. D.* could not write, and *C. D.* could write his name only: held sufficient. *Doe d. Counsell v. Caperton*, 9 C. & P. 112.

Thirty Years Old, p. 381.

Letters more than thirty years old, produced from the proper custody, require no proof. *Doe v. Beynon*, 4 P. & D. 193. *Beer v. Ward*, Phill. on Ev. 652, note (u).

Evidence that the party to whose mother letters were addressed was living with her mother at the time of her death, when the keys and papers were given up to her, is sufficient evidence of proper custody to warrant the reading of the letters. *Doe v. Brynder*, 4 P. & D. 193.

Where, in ejectment by mortgagee, a prior deed of settlement was produced, found amongst the papers of the mortgagor, lately deceased, he being the tenant for life under it; held, that the custody was sufficient to render it admissible without proof of execution, being above thirty years old. *Doe v. Samples*, 3 Nev. & P. 254.

Proof in case of Loss, p. 387.

Where the copy of an ancient grant in the chartulary of an abbey had been received, among other documents, to establish the antiquity of a weir on a public river, and objection was made to the whole class of evidence, which was afterwards held to have been properly received, and the objection as to the reception of the copy, no search having been first proved to have been made for the original, was not particularly pressed,

the Court would not allow it afterwards to prevail, it being one of many others unquestionable, and its rejection not sufficient to have varied the verdict. *Williams v. Wilcox*, 3 Nev. & P. 606.

In an action against carriers for breach of an *entire* contract to carry goods, to be delivered at two places, the plaintiff produced at the trial a note containing the terms of carrying the one moiety, and it was proved that the usual note was delivered with the other moiety; held, that it appearing to contain the terms of the contract as to that part, and that no sufficient search had been made for it, secondary evidence of its contents could not be received. *Thompson v. Travis*, 8 Sc. 85.

Where an objection to the admissibility of a copy of an ancient grant, on the ground of no search having been made for the original, was not particularly called to the attention of the Judge at the trial, and being one of many documents tending to prove a right which was unquestionable, and the admission could not have varied the verdict, the Court refused, on motion for a new trial, to allow the objection to prevail. *Wilcox v. Wilcox*, 8 Ad. & Ell. 314.

Secondary Evidence, p. 393.

An examined copy of an entry in the Middlesex registry of deeds was received as secondary evidence of the original, which could not be obtained. *Collins v. Maule*, 8 C. & P. 502.

So entries of the admission of a party to the freedom of a city company, duly vouched by other freemen, was admitted, not on the ground of hearsay, but as of an act done by the company, viz. receiving the party as of a certain description, who and what he was, to be entitled to admission. *Collins v. Maule*, 8 C. & P. 502.

There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power; a deed may be proved by parol, although an attested copy exists. *Doe v. Ross*, 8 Dowl. 389; and 7 M. & W. 102.

Where the surrender of a copyhold was by a power of attorney, it was held that the court-roll, stating it to be by power of attorney, was secondary evidence of the power of attorney, if it could not be found. *Doe v. Caperton*, 9 C. & P. 115.

Notice having been given to produce letters written by the defendant to the defendant's agents in America, the defendant agreed to produce his letter-book at the trial; the letters contained in the letter-book produced are secondary evidence, but the defendant is not entitled to read other letters contained in it, the fact of the copies being contained in a merchant's letter-book is evidence against the party that the letters had been sent. *Sturge v. Buchanan*, 2 P. & D. 573.

A party after refusal to produce a document, and secondary evidence given of its contents, cannot afterwards produce the document as his own evidence. *Doe v. Hodgson*, 4 P. & D. 142.

The copy of a copy of a *fi. fa.* is not receivable in evidence. *Everingham v. Roundell*, 2 Lew. Cr. Cases, 157.

Where the witness to prove a parol letting stated that the plaintiff at the time read some minutes taken down in pencil, to which the defendant assented, and they were afterwards entered by the witness in a book from which he refreshed his memory; held, that there being no proof what the minutes were, the parol evidence was admissible, and that the minute need not be produced. *Trewitt v. Lambert*, 10 Ad. & Ell, 470; and 3 P. & D. 676.

The Court will not receive secondary evidence of an instrument without notice to produce, upon the mere proof of its being in the possession of the opposite party. *Knight v. Marquis of Waterford*, 4 Younge & C. 284.

Notes on the back of the brief of counsel on a trial at law, held admissible evidence in a suit in equity. *Cattell v. Corral*, 3 Younge & C. 413.

Possession by the Adversary, &c. p. 398.

Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a *subpœna duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents. *Doe v. Ross*, 7 M. & W. 102.

Where a document, being scheduled in an answer in a suit in equity, was deposited in that Court, and an order made for delivering it to the party; held, that it was so far within his control; that, on failure to produce it on notice, secondary evidence of it might be given. *Rush v. Peacock*, 2 M. & R. 162.

Where the minute-books of the directors of an intended joint-stock company were seen, four months before the trial, in the desk of the secretary, at the office of the company, and it was proved that he had given up the key of the desk into the hands of the manager, it was held to be sufficient to let in secondary evidence of the minutes, after refusal upon notice to produce. *Bell v. Francis*, 9 C. & P. 66.

Where of two defendants, G. and L., L. had suffered judgment by default, a Judge's order of admission was made under the rule Hil. 4 W. 4, 20, on notice that the defendant G. proposed to adduce the documents specified (which might be inspected), and that the plaintiff would be required to admit that they were copies of, or extracts from, original documents (as they purported to be); and the documents were described as "copies of, or extracts from, letter from plaintiff to defendant, dated, &c.:" held, that this did not authorize the giving in evidence such copy, without further proof of the original, though notice had been given to produce, it not being proved that plaintiff had the original. *Sharpe v. Lamb*, 11 A. & E. 805.

Notice was given to produce letters written to the defendant's partners in New South Wales, and upon a summons to admit copies, the defendant agreed to produce his letter-book at the trial; held, first, that proceedings in Chancery having taken place in 1832, when also the action was commenced, in reference to those letters, they were to be presumed to have been received back, and that a four days' notice to produce was sufficient. *Sturge v. Buchanan*, 2 P. & D. 573.

Where a document is called for after notice to produce by the plaintiff, the defendant may, during the plaintiff's case, produce evidence to show the document lawfully out of his possession; and on such evidence it is solely for the Judge to determine whether secondary evidence be admissible, and it gives the plaintiff's counsel no reply to the jury. *Harvey v. Mitchell*, 2 M. & R. 366.

The non-production of an original document, although letting in secondary evidence, does not open the door to any loose secondary evidence, as of a paper purporting to be only substantially a copy of the original. *Everingham v. Roundell*, 2 Mo. & R. 138.

Notice to produce, p. 400.

Where enough is stated in the notice to produce to leave no doubt but that the party must be aware of the particular instrument intended to be called for, held sufficient to let in secondary evidence. *Rogers v. Custance*, 2 Mo. & R. 179.

A notice to produce all letters written by the one party to and received by the other between the years 1837 and 1841, both inclusive, was held sufficient to entitle the party to call for a particular letter. *Morris v. Hauser*, 2 Mo. & R. 392.

If a notice to produce has been duly served on a party in the cause, it is not nullified by a subsequent bad service of notice on the attorney. *Hughes v. Budd*, 8 Dowl. 315.

A notice to produce served on the party himself a week before a trial is in sufficient time, although he has employed an attorney in the cause. *Hughes v. Budd*, 8 Dowl. P. C. 315.

A cause was tried at the assizes on a Monday, the commission-day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorney on whom the notice to produce was served, and also the party who was his client, lived in the assize town. Held, that the service of the notice to produce was not too late, and that the question in such cases is, whether, under all the circumstances, reasonable notice has been given. *Firkin v. Edwards*, 9 C. & P. 478.

In a town cause, a notice to produce a paper which might be presumed to be in the hands of the opposite attorney, was served at 8 P.M. on the evening before the trial, at his office, on one of his clerks, who had the management of the cause; held, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents. *Gibbons v. Powell*, 9 C. & P. 634.

Where none of the parties lived in the assize town, the plaintiff's attorney served the defendant's attorney in the assize town, on the commission-day, with notice to produce a paper, and offered to pay the expenses of going to fetch it. The defendant's attorney said that that was of no use, as the paper was not in existence; held, that the plaintiff, on the trial, might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objections as to the lateness of the service of the notice to produce. *Foster v. Pointer*, 9 C. & P. 718.

Where the notice to produce was served upon the defendant at five o'clock on the commission-day, he having left home for the assize town nine miles distant from his office, it was held to be too late. *George v. Thompson*, 4 Dowl. 656.

A notice to produce, served late in the evening at the attorney's office, after he had left, although before nine o'clock, held too late. *Holt v. Miers*, 9 C. & P. 191.

In trespass for shooting a dog, the Judge received a copy of a notice on a board fixed in the plantations, without notice to produce the original. *Bartholomew v. Stephens*, 8 C. & P. 728.

Proof of Deed coming from the Adversary's Possession, p. 405.

Where both parties in ejectment claimed under a lease produced by the defendant on notice, held that the plaintiff was not bound to prove it. *Doe v. Wilkins*, 5 Nev. & M. 434.

Enrolment, Proof by, p. 410.

An enrolment of the deed of disposition under 3 & 4 W. 4, c. 74, relates back to the date of its execution, and when enrolled within the six months, enables a tenant in tail to make a good title, although the entail is not barred under the statute. *Cattell v. Corrall*, 4 Younge & C. 228.

To prove the enrolment of a deed under the 9 Geo. 2, c. 36, the deed was produced with the following memorandum indorsed thereon: "Inrolled in his Majesty's High Court of Chancery the 17th day of December 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." Evidence was given, that Mr. Drew was a person who at the time of the trial acted as the clerk of the enrolments in the Court of Chancery, and that, on the memorandum being produced to him a short time before the trial, at the Six Clerks' Office, which is under the same roof as the Enrolment Office, Mr. Drew acknowledged the name to be his signature: held sufficient; the memorandum having been made by the proper officer, in the execution of his duty. *Doe d. Williams v. Lloyd*, 1 Scott, N. S. 505.

The Whole to be read, p. 414.

See the *Attorney General v. Bond*, 9 C. & P. 189.

Onus Probandi, p. 418.

Where an averment is essential to the claim made or plea set-up, and such averment is *denied* by the adversary, it seems to be generally true that the proof lies on the party so averring, for otherwise his claim or defence fails; and this seems to hold, whether such essential fact be averred positively or negatively.

Assumpsit, for not delivering hay of a certain quality; plea, that defendant tendered hay of that quality, and that the plaintiff refused to receive it; held that, being a traverse of an allegation in the declaration, the issue lay on the plaintiff. *Crowley v. Page*, 7 C. & P. 790.

Right to begin, p. 418.

In *assumpsit* on a building agreement, the issue being whether it was executed according to the specification, it was held that the plaintiff was to begin. *Smith v. Davies*, 7 C. & P. 307.

Assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that the drawer indorsed it to the plaintiff. Plea, that the bill was drawn and accepted for his accommodation, and handed to the drawer that he might get it discounted; that the drawer indorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which facts the plaintiff had notice; the defendant must begin. *Lees v. Hoffstadt*, 9 C. & P. 599.

In *assumpsit* the defendant pleads his discharge under the Insolvent Debtors' Act, and the plaintiff by his replication denies the plea; the defendant must begin. *Lambert v. Hale*, 9 C. & P. 506.

The plaintiff is to prove his case to the satisfaction of the jury; and if he leave it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict. *Long v. Hitchcock*, 9 C. & P. 619.

Assumpsit by the marshal of the Queen's Bench prison, that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned, and other expenses. Plea, that A., the execution creditor and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W. and to cause him (if he should go beyond the rules) to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that in pursuance of that conspiracy a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew

the premises, and would not plead the same as a defence to *A.*'s action against him, and would not allow the defendant to defend that action. Replication, admitting the writ and warrant, with *de injuriâ* as to the residue: held, that on these pleadings the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea. *Chapman v. Emden*, 9 C. & P. 712.

Action for breach of contract; plea, that it was obtained by fraud and covin; the defendant is entitled to begin. *Steinkeller v. Newton*, 9 C. & P. 313.

Issue in an action on a charter-party, whether the defendant furnished a sufficient cargo, and the plaintiff, after notice, refused to receive the cargo offered; the plaintiff is entitled to begin. *Ridgway v. Ewbank*, 2 Mo. & R. 217.

But where the declaration on an issue averred that the goods were not the property of the plaintiffs, or either of them; plea, that the goods were the property of the plaintiffs, or one of them; it was held, that the defendant has a right to begin, the affirmative lying on him. *Hudson v. Brown*, 8 C. & P. 774.

Covenant for not leaving in repair; the plaintiff alleged that the premises were dilapidated, and the defendant that they were not; the plaintiff is entitled to begin. *Soward v. Leggatt*, 7 C. & P. 613.

In an action of covenant the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches, that the defendant did not occupy in a proper manner, and did not keep the premises in repair. Plea, that the defendant did occupy in a proper manner, and did keep the premises in repair. Held, that on these issues the plaintiff had the right to begin. *Doe d Trustees of Worcester School v. Rowlands*, 9 C. & P. 734.

Ejectment by the heir against a party claiming under a will, the latter is entitled to begin (having admitted the lessor of plaintiff to be heir), although the plaintiff profess to claim under an outstanding term of part of the premises. *Doe v. Smart*, 1 Mo. & R. 47.

Where the accounts of trustees under a local Act were directed to be audited, and allowed at the sessions; held, nevertheless, that they were compellable to produce them before the auditors of the parish accounts under the 1 & 2 Will. 4, c. 60, s. 34 (Vestry Act), but that a mandamus, issued against them, ordering more than was warranted either by the grievance recited or by the provisions of the Vestry Act, was bad: and it was held that wherever there is anything in the shape of a return, the counsel for the Crown are entitled to begin. *R. v. St. Pancras Trustees*, 1 N. & P. 507.

To a *mandamus* to restore a parish clerk to the office, the rector returned that he was guilty of habits of intoxication; in an action for a false return, the declaration negating the allegations in the return, which the defendant repeated in his plea; the defendant is entitled to begin. *Bowles v. Neale*, 7 C. & P. 263.

Upon the plea only of payment, it is for the defendant to begin; having admitted the existence of a debt, it is his duty to discharge himself from it. *Richardson v. Fell*, 4 Dowl. 10.

In trespass for taking goods as a distress for an annuity, and also for rent, it was held that, upon the issues, the annuity not in arrear, and *non tenuit*, the defendant is entitled to begin. *Aston v. Perkes*, 9 C. & P. 231.

In debt for a penalty under the statute against the sheriff for carrying the plaintiff to prison within 24 hours, and plea, that it was with his consent, on which issue was joined; it was held, that the defendant was entitled to begin. *Silk v. Middlessex Sheriff*, 7 C. & P. 14.

Where the action is brought to recover substantial damages, and the plaintiff is under the necessity of satisfying the jury as to what amount they ought to be, he has a right to begin. *Hoggell v. Oxley*, 2 Mo. & R. 251; and 9 C. & P. 324.

Arguments of Counsel, p. 422.

Where one of several pleas was demurred to, and issue taken on others; it was held, that notwithstanding the *venire* to assess damages on the former, the plaintiff was not entitled to advert, at the trial, to the matters in the plea as being admitted by the demurrer. *Ingram v. Lawson*, 2 Mo. & R. 253.

Semble, where a party in a civil suit conducts his own case, counsel ought not to be heard as to points of law. *Moscatti v. Lawson*, 7 C. & P. 32.

The duty of a counsel in a prosecution is, to assist in the furtherance of justice, without considering himself as acting for any side or party. *R. v. Thursfield*, 8 C. & P. 269.

Wherever there is counsel for the prisoner, the case should be opened by the counsel for the prosecution. *R. v. Gascoine*, 7 C. & P. 772.

So although there be none, if the circumstances of the case are peculiar. *R. v. Bowler*, 1b. 773.

In opening the case for the prosecution, counsel is entitled to state to the jury declarations by the prisoner, as well as facts. *R. v. Orrell*, 1 Mo. & R. 467.

The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown, and to state that if such attack should be made he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned Judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopts them as his own opinions, and makes them part of his own address to the jury. *R. v. Courvoisier*, 9 C. & P. 362.

Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the Court, to a gentleman at the bar, he should, it is said, consider himself as counsel for the Crown, and act in all respects as he would if he had been instructed by the prosecutor; and

should not consider himself merely as acting in assistance of the Judge, by examining the witnesses. *R. v. Littleton*, 9 C. & P. 671.

Where different defendants appear by separate counsel, the issues raised by their respective pleas being the same, only one counsel will be allowed to address the jury. *Sparkes v. Barrett and another*, 8 C. & P. 442. And see *Mason v. Ditchbourne*, 1 Mo. & R. 462; *Seale v. Evans*, 7 C. & P. 593.

A prisoner, since the statute, is not entitled to the privilege of two statements, one by himself and another by his counsel. *R. v. Burrows*, 2 Mo. & R. 124; *R. v. Rider*, 8 C. & P. 539.

His counsel cannot state the prisoner's story, nor anything which he is not in a condition to prove. *R. v. Beard*, 8 C. & P. 142.

But where no person was present at the time to contradict the prosecutor's statement, the prisoner has been allowed to make his statement before his counsel addressed the jury. *R. v. Malings*, 8 C. & P. 242.

After the prisoner's counsel has addressed the jury, the prisoner cannot also be heard. *R. v. Boucher*, 8 C. & P. 141; *R. v. Rider*, 8 C. & P. 539.

Evidence and Arguments in Reply, p. 423.

In trespass for taking goods which in one plea the defendants justified on the ground of their having been fraudulently removed to avoid distress, it was held that the plaintiff might reserve his answer in reply. *Ashmore v. Handy*, 7 C. & P. 501.

In strictness the counsel may reply, although the evidence called on the part of the prisoner is only to character, although the Court would recommend the right to be exercised only under special circumstances. *R. v. Stannard*, 7 C. & P. 673. But see *Patteson's Case*, 2 Lewin's Cr. C. 262.

And the right to reply will be on the whole case, and not only on the evidence to character. *R. v. Whiting*, 7 C. & P. 771.

Where the order for trial of an issue directs all witnesses to be examined, and the plaintiff, conceiving his case made out, declines calling some, the Judge will do so, and the plaintiff may make observations thereon, and the defendant may reply on such observations. *Groom v. Chambers*, 2 M. & Ayr. 742.

Where evidence is called only to character, the prosecutor is strictly entitled to reply, although it may be for his discretion whether he will do so or not. In cases of Crown prosecutions, the prosecutor is entitled in strictness to reply, whether the prisoner calls witnesses or not. 1 Ry. & M. 495; 7 C. & P. 676.

On an indictment against two for stealing sheep, and two for receiving parts of the sheep stolen, the latter of whom only called witnesses; held, that the counsel for the prosecution, although entitled to the general reply, was bound to confine himself to the case of the party calling witnesses, the offences being separate, and the subject of distinct indictments. *R. v. Hayes and others*, 2 Mo. & R. 155.

A. was charged with feloniously carnally knowing and abusing a girl under ten. *B.* was charged with being present, aiding and abetting. *A.*'s

counsel called no witnesses. *B.*, who had no counsel, called a witness to prove an *alibi* for *A.*; held, that this evidence was in effect evidence for *A.*, and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was *summum jus*, and ought to be exercised with great forbearance. *R. v. Jordan*, 9 C. & P. 118. *Qu.*

In case for an injury by negligent driving at *L.*, the defendant set up an *alibi*, viz. at *R.*; it was held, that this being a question on a new fact disclosed in the defence, the plaintiff was entitled to call evidence in contradiction of such new fact, although the general nature of the defence had been disclosed by the cross-examination. *Briggs v. Aynsworth*, 2 Mo. & R. 108.

A prosecutor is not entitled to call witnesses to strengthen his case after the prisoner's case is concluded. The calling witnesses to contradict the prisoner's witness, admits of a different consideration. 2 Lew. Cr. Cases, 151.

Order of Proof where there are several Issues, p. 424.

The same rule is held to prevail in replevin as in other actions, that where any one issue is on the plaintiff, he is entitled to begin. *James v. Salter*, 1 Mo. & R. 501.

Appeal, p. 428.

Where *A.* presents a petition of appeal, and *B.* presents a counter petition, praying that the former may be dismissed as incompetent, *B.* is entitled to begin on the argument as to the competency of the appeal. *Gray v. Forbes*, 5 Cl. & F. App. Cas. 357.

On the trial of an issue directed by the Court of Chancery to try whether the plaintiff was the next of kin of *J. S.* (with the usual order for indorsing any special matter on the record), one defendant, *A. B.*, claimed to be as nearly related to *J. S.* as the plaintiff was, the other defendant *C. D.* set up a claim inconsistent with the cases both of the plaintiff and *A. B.*; held, that at the close of the plaintiff's case, *C. D.* should not only open but prove his case, and that then *A. B.* should do the like, the plaintiff having the general reply to both. *Phillips v. Willetts*, 2 Mo. & R. 319.

Matter in Issue—Relevancy, p. 430.

An issue ought not to be allowed by the Court to be tried at Nisi Prius which is not raised by the pleadings, unless the parties amend the pleadings. Per Patteson, J. in *Ellison v. Isles*, 11 Ad. & Ell. 665.

Election by a Prosecutor, p. 430.

The application for a prosecutor to elect is to the discretion of the Judge; where several houses had been burnt, and the setting each on fire was alleged in distinct counts, being one transaction, the Judge refused the application. *R. v. Trueman*, 8 C. & P. 727.

Variance, p. 430.

The word "sheep" is *nomen generalissimum*, and includes all ages and sexes. *M'Cully's Case*, 2 Lew. Cr. Cas. 272; overruling *Puddefoot's Case*, Ry. & M. Cr. C. 247.

The word "accuse" is to be construed to have the same meaning as "impute," in 7 & 8 Geo. 4, c. 29, s. 8.

In case against the sheriff for a false return, the declaration being dated in the reign of the Queen, alleged the judgment in the reign of the late King, as appeared by the record "still remaining in the said Court of our said Lord the late King;" held, that there being such a record, there was no variance. *Lewis v. Alcock*, 6 Dowl. 78; and 3 M. & W. 188.

Amendment, p. 496.

The power of amending under the 3 & 4 Will. 4, c. 42, s. 23, is not confined to any stage of the proceedings; it was held, therefore, that the Judge might amend the *Nisi Prius* record, by inserting the date of the writ of summons. *Cox v. Painter*, 1 Nev. & P. 581.

A judge cannot give leave to amend, under 4 & 5 W. 4, c. 42, after verdict. *Doe v. Long*, 9 C. & P. 777.

In cases of doubt the Judge at the trial will allow amendments, because that section provides a remedy if the Judge allows an amendment which ought not to be made, but gives no remedy in any case in which the Judge has refused to allow an amendment. *Jenkins v. Phillips*, 9 C. & P. 766.

The record was allowed to be amended by inserting a count for goods, which was in the declaration, and issue delivered. *Ernest v. Brown*, 2 Mo. & R. 13.

An amendment by substituting a count in trover for one for negligence in the custody of the plaintiff's goods, was allowed after issue joined, and a peremptory undertaking to try. *Story v. Watson*, 2 Sc. 842.

In Assumpsit.

Assumpsit on warranty of soundness of a horse on a contract of exchange of horses, the omission to allege as part of consideration, the plaintiff's undertaking to warrant is a fatal variance, and Coleridge, J., refused to amend. *Liv. Sp. Ass.* 1838.

A declaration stated that the plaintiff became and was tenant to the defendant on the terms contained in articles of agreement, whereby the defendant agreed to grant the plaintiff a future lease for 21 years, and averred that the defendant promised that he should hold the premises without hindrance, &c. from the defendant, and alleged as a breach that the plaintiff was ejected by a person having title under a previous lease. Held, that a Judge had no power under the 3 & 4 W. 4, c. 42, s. 23, to amend the declaration by such alterations as were necessary in order to treat the agreement, not as a demise, but as a contract for a future lease, and make the breach consist in the defendant having no title to grant the lease. *Brashier v. Jackson*, 8 Dowl. P. C. 784.

Where the amendment sought to be made, stated virtually a new contract and a new breach, the case was held not to be within the statute; held, also, that an amendment of the record must be made during the

trial and before verdict, and the Judge cannot give a party leave to amend on a future day, *Brashier v. Jackson*, 6 M. & W. 549.

Where in *assumpsit* for money advanced to a third party, on the defendant's guarantee, the effect of it, as stated in the declaration, being to extend the liability beyond the fair import of the terms of the instrument when produced in evidence; it was held, that it was a case within the 9 Geo. 4, c. 15, and that the record might be amended at the trial, but that the defendant should be allowed the costs occasioned by such misstatement of the claim. *Smith v. Brandram*, 9 Dowl. 430.

The declaration on a charter party (on a voyage from *A.* to some port in *O.*, to touch at *C.* for orders as to the loading, and with option then to determine the voyage,) went on to allege a promise to have an agent at *C.* to give such orders or exercise the option, which the Judge considered to be only intended as a statement of the legal effect, and not of a substantive part of the contract; held, that he had the right, and had properly exercised the power, of amending the declaration by striking out the allegation and inserting a correct one as to the legal effect, although the defendant had gone to trial with the intention of contesting the original allegation. *Whitwill v. Scheer*, 8 Ad. & Ell. 301; and N. & P. 398.

In *assumpsit* on a wager that a railroad would be completed by a certain day for the general conveyance of passengers, and the wager proved was simply that it would be completed, the Judge permitted an amendment by striking out those words; and it was held to have been properly done, as imposing an increased burthen on the plaintiff, and not being an amendment in any material particular. *Evans v. Fryer*, 2 P. & D. 541.

Where in *assumpsit* the declaration stated the undertaking to erect a building, and fit it up according to certain plans, by a day stated, for the sum of 20 *l.*, plea, *non assumpsit*, and that the agreement was rescinded; the contract proved was for the erecting certain seats (for the coronation) to be completed four or five days before, &c., for the sum of 25 *l.*, and it appeared that no plans were ever agreed upon; held, that the judge properly allowed the record to be amended according to the true contract, it not being material to the merits of the case. *Ward v. Pearson*, 5 M. & W. 16; and 7 Dowl. 382.

The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach-fare of the man back to London, and also the hack carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the Judge at *Nisi Prius* allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. *Read v. Dunsmore*, 9 C. & P. 588.

The omission in an action on an agreement (containing various stipula-

tions on either side, not dependent on each other) is not a ground of nonsuit; and if it were, might it seems, be amended at the trial. *Clarke v. Morrell*, 2 Scott N. S. 17.

Bill of Exchange.

Declaration on a promissory note for 250 *l.*, made by the defendant, dated the 9th of November 1838, payable to the plaintiffs or their order on demand. Plea, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for 250 *l.*, made by the defendant and his wife, dated the 6th of November 1837, payable twelve months after date. There was no proof of any other note between the parties :—Held, that this was a variance properly amended at *Nisi Prius*. *Beckett v. Dutton*, 7 M. & W. 157; 8 Dowl. 865.

Distringas.

An amendment was allowed at *nisi prius* by indorsing on the *distringas* the execution by the sheriff, and the record re-entered. *Masters v. Lewis*, 2 Mo. & R. 59.

Ejectment.

Where the demise in ejectment was laid on a day, omitting the year, held that it was not a case within the Act, for amending by inserting the year, as to which the title was proved, but that the omission was not a ground of nonsuit; and *semble*, the defendant might apply to have the correct year inserted. *Doe v. Heather*, 8 M. & W. 158.

Where at the trial it appeared that the day of the demise was antecedent to the right of entry for forfeiture, it was held to be a case for amendment, under 3 & 4 Will. 4, c. 42, s. 28, and that the terms of the rule to confess, &c., would apply themselves to the declaration when amended. *Doe v. Leach*, 9 Dowl. 877.

The Court refused to allow a declaration in ejectment to be amended by inserting the name of John for James, although no party had appeared. *Doe d. Street v. Roe*, 8 Dowl. 444.

Fraudulent Representation.

In case for a fraudulent misrepresentation, the declaration being substantially proved, the Judge allowed the statement of the terms of the representation to be amended under 3 & 4 Will. 4, c. 42, s. 23. *Mash v. Densham*, 1 Mo. & R. 442.

Indictment.

Where an indictment against the prisoner for the murder of her husband described her as "the wife of," &c., the Judge directed the description to be amended, by describing her as "widow." *R. v. Orchard*, 8 C. & P. 565.

Issue.

After an issue delivered in the usual form for trial at *nisi prius*, and a subsequent order for trial before the sheriff; held that the former issue

ought to have been amended, and that the delivery of it in the original form was irregular. *Ward v. Peel*, 1 M. & W. 743; 1 T. & G. 1135; and 5 Dowl. 169.

A copy of the issue delivered with the *teste*, and return, writ being left in blanks, was allowed to be amended. *Watts v. Ball*, 1 Sc. N. S. 173; and 8 Dowl. 589.

Libel.

In an action for a libel the declaration stated, that the defendant published a libel, "contained in, and being an article in, a certain weekly printed publication, or paper, called the Paul Pry." At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from the Paul Pry, to several persons for them to read, and that they read it:—Held, that the Judge at the trial might properly allow the record to be amended by striking out the above-mentioned allegation, that the libel was contained in, and was an article in, the Paul Pry. *Foster v. Pointer*, 9 C. & P. 718.

Where the declaration for slander, stated the words in English, although spoken in Welsh, the Judge allowed the declaration to be amended by inserting the Welsh words of the English translation, but on payment of the costs of the day to be taxed, and a sum deposited for such costs, and if the defendant would undertake to justify the Welsh words, then to put the plaintiff to withdraw the record. *Jenkins v. Phillips*, 9 C. & P. 766.

In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those Welsh words in the declaration. *Ibid.*

So in case for slander, where the words stated in the declaration varied from those proved, the case was held to be within the statute, which is to receive a liberal construction. *Smith v. Knowelden*, 9 Dowl. 40.

The Lord Chief Justice refused at the trial to allow an amendment, by striking out several innuendoes, admitted to have no reference to the plaintiff. *Prudhomme v. Fraser*, 1 Mo. & R. 435; S. C. 2 Ad. & Ell. 645.

Misnomer.

In an action brought against the secretary of an incorporated company, for the infringement of a patent by the latter, the Court, after a verdict with nominal damages, reluctantly and on payment of the costs, and of waiving the costs of the trial, allowed the plaintiff to amend by introducing an averment that the company was incorporated, and a proper description of the defendant as the registered officer according to the statute. *Galloway v. Bleadon*, 1 Sc. N. S. 171.

Where the assignees issued a *sci. fa.* on a judgment obtained before the bankruptcy, but omitted to join the official assignee, an amendment by adding his name, was allowed on payment of costs. *Holland v. Philips*, 2 P. & D. 336; and 10 Ad. & Ell. 149.

Penal Action.

It is as much of course to allow amendment in a penal as in other actions, unless there has been unnecessary delay ; and the Court, in an action for penalties under 18 Geo. 2, c. 20, s. 3, against a magistrate for acting without qualification, allowed the declaration to be amended after a former application, and although the plaintiff was sworn to be in indigent circumstances, refused to impose the term of security for costs. *Jones v. Edwards*, 3 M. & W. 218 ; and 6 Dowl. 369.

Perjury.

On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine witnesses : it was held to be a fatal variance, and the Judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15. *R. v. Hewins*, 9 C. & P. 786.

Amendments in criminal cases should be made very sparingly ; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the Grand Jury. *Ibid.*

The Judges are unwilling to allow the amendment of variances, which might have been avoided by ordinary care. *Ibid.*

Replevin.

The Judge refuses to amend in replevin in respect of a variance in the terms of a tenancy, but directs the jury to find the facts specially ; the Court has no power to give judgment according to the justice of the case if the opposite party may have been prejudiced by the mis-statement. *Knight v. M'Dowall*, 4 P. & D. 168.

The Court in such case has no power to strike out the indorsement. *Ibid.*

In replevin, an amendment was allowed by altering the allegation of amount of rent. Per Parke, B., York Summer Assizes, 1836.

Where, the declaration being dated before the first day of Easter, 1834, the defendant was not precluded from avowing doubly, and the jury found a less rent due than was claimed by the avowry, and the defendant did not apply to amend, the contest being, in fact, as to what was the rent, the Court refused an application for a new trial, and to amend the avowry. *Serjeant v. Chafy*, 5 Ad. & Ell. 354.

Where the issue at the trial was as to the amount of the rent, which was found according to the avowry, but the jury found a different holding ; held, that the case was within the spirit of 3 & 4 Will. 4, c. 42, s. 24, and that it was too late for the plaintiff to take advantage of the latter variance, and that the defendant might amend the avowry on record, although the plaintiff had given notice that he should rely on the variance, and no application to amend had been made at the trial. *Gayler v. Farrant*, 4 Bing. N. C. 286 ; and 6 Dowl. 426.

Replication.

An amendment of the prayer of the replication to a plea of *nul tiel* record was allowed after trial of the issue. *George v. Rookes*, 8 Dowl. 505.

Similiter.

Where the issue contained an "&c." after the replication, and no *similiter* was added, but it was properly added on the *nisi prius* record, it was held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and rule for arresting the judgment discharged; and *semb.*, the rule of Trin. 2 Will. 4, s. 65, was intended only to apply to cases tried in term. *Brook v. Finch*, 6 Dowl. 313.

Where the record at the trial appeared to be defective for want of a *similiter*, amendment allowed by inserting it, but the jury re-sworn. *Dyson v. Warris*, 1 M. & R. 474.

Sums.

Where the particulars showed the exact amount claimed, the Judge allowed the declaration to be amended, by increasing the sums stated in each count. *Dew v. Katz*, 8 C. & P. 315.

Time.

Where in trover by the assignee the conversion was laid in his time, being in fact before the insolvency, the Court, considering that the real question to be tried was not thereby varied, allowed the plaintiff to amend. *Norcutt v. Mottram*, 7 Sc. 176.

Trover.

Trover against a collector of customs, upon a question as to the sufficiency of the amount of duty tendered, the proceedings being suspended until the decision of an action in the King's Bench, upon the same question, it having been decided that the action should be in case for nonfeasance and not in trover, the Court, though reluctantly, after the delay allowed an amendment by substituting a count for nonfeasance for the one in trover. *Legge v. Boyd*, 6 Bing. N. C. 240; and 8 Dowl. 272.

Verdict.

An amendment of the *postea* may be made in a criminal case from a Judge's notes, but it is matter of discretion not to make such an amendment from mere recollection. *R. v. Virrier*, 4 P. & D. 161.

Where the Judge on the trial had directed the jury that the plaintiff was entitled to nominal damages, as to one count at least, and they gave a verdict for 1s., which was entered generally on the *postea*; held, that the Judge might amend the record according to the manifest intention of the jury, by directing the verdict to be entered on one count, with damages, for the plaintiff, and for the defendant on the others. *Ernest v. Brown*, 6 Bing. N. C. 162.

Where one of two counts was bad, the evidence applicable to both, and the verdict general; the Court would not amend the *postea* by ordering the verdict to be entered on the good count. *Empson v. Griffin*, 3 P. & D. 160; doubting the authority of *Williams v. Breedon*, 1 B. & P. 329.

After the trial, at which the defendant appeared and defended, the Court refused to set aside the verdict on the ground of variance between the writ of summons and writ of trial, but gave leave to amend on payment of costs. *Percival v. Connell*, 3 Bing. N. C. 877.

Writ—Time.

A variance between the issue and the writ of trial may be amended at any time. *Farwig v. Cockerton*, 6 Dowl. 337; and 3 M. & W. 169.

Where the date of the suing out the writ, the commencement of the action, was not stated on the record, the Judge allowed the plaintiff to amend, by annexing the writ thereto at the trial. *Cox v. Painter*, 7 C. & P. 767.

A Judge has power to amend the writ of summons, as to date, to make it conformable to the *præcipe*; as where the latter was dated 4th April, and the former, by mistake, the 4th April. *Kirk v. Dolby*, 6 Mees. & W. 636; and 8 Dowl. 767.

If the sum indorsed on the writ of summons exceeds 20 *l.*, a peremptory undertaking to try before the sheriff cannot be required, but the Court will amend by reducing the sum indorsed, and direct that the writ of trial shall go, unless the substituted sum, with costs of the writ, be paid within a stated time. *Frodsham v. Round*, 4 Dowl. 569.

Where, upon a writ of trial before the under-sheriff, the particulars claiming 16 *l.* 10 *s.* 8 *d.*, the writ of summons being put in, appeared to be indorsed for 58 *l.*, and after verdict found for the defendant a new trial was ordered, the Court allowed the indorsement to be amended, without applying to a Judge. *Edge v. Shaw*, 2 Cr. M. & R. 415; and 4 Dowl. 189.

Where the remedy was still open on the bond, although six years had elapsed, the Court refused to amend the writ, which had been sued out on promises instead of debt. *Partridge v. Walbank*, 3 Cr. M. & R. 316.

Best Evidence, p. 500.

Where the plaintiff as secretary sued some out of several parties liable, being the committee of a charitable society, it was held, that having been appointed by a resolution entered in a book, he was bound to produce it, and that, it being in the custody of parties not sued, notice to the defendants to produce it did not entitle him to give secondary evidence of its contents. *Whitford v. Tutin*, 10 Bing. 395.

Judicial Notice, p. 507.

It seems that in general a Court will notice what ought to be generally known within the limits of its jurisdiction, and that a Court of Error will

take notice of what ought to be generally known within the limits of the jurisdiction where the cause commenced. A Court of Error will take judicial notice that the County Court has no authority to give leave to plead double. *Chitty v. Dendy*, 3 Ad. & Ell. 319; and 4 N. & M. 842.

The Courts will take judicial notice of the signature of the marshal and his deputy, and a defendant was discharged without an affidavit verifying the copy of causes certified by the latter. *Alcock v. Whatmore*, 8 Dowl. 615.

The Courts will take notice that by the Kingdom of Ireland is meant that part of the United Kingdom of Great Britain and Ireland called Ireland. *Whyte v. Rose*, 4 P. & D. 199.

They will not notice that a particular street is not in a certain county, although it may be generally known to be situated in another. *Humphreys v. Budd*, 9 Dowl. 1000.

Nor the stamp upon a copy of a Judge's order, it not being the seal of the Court, but the mark of the Judge's clerk. *Company of Proprietors of the Barrett Navigation v. Shower*, 8 Dowl. 173.

Law and Fact, p. 510.

Where the plaintiff by letter offered "a cargo of good barley" at a certain price, and the defendant, in answer, agreed to accept the cargo, adding, "expecting you will give us fine barley, and full weight;" this the plaintiff declined doing, insisting, and which the Court found, that there was a known distinction in the trade between good and fine barley; and it was held, that although the jury were to say what meaning was to be given to the terms of the contract, yet it was for the Court to put a construction on it, and that the defendant's letter was not such an acceptance as was binding on the plaintiff. *Hutchison v. Bowker*, 5 M. & W. 535.

Upon a contract to serve as a news reporter, at certain wages, for one whole year, and so from year to year so long as the parties should respectively please, it was held to be a yearly service, which could not be terminated but at the end of the current year. The usage in the case of menial servants, to discharge the contract at a month's notice, is only matter of fact, triable by the jury, and not matter of law; and if put on the record as matter of law, the Court could not distinguish it from any other yearly contract of service. *Williams v. Byrne*, 2 N. & P. 139.

Bill of Exceptions, p. 529.

A bill of exceptions tendered to the direction given by the Judge to the jury, set forth the pleadings and evidence, and then referred to a lease, part of which was inserted by way of extract. The judgment of the Court on the bill of exceptions having been brought up by writ of error to this House, the counsel for the plaintiff in error proposed to read a part of the lease not extracted into the bill of exceptions. Held, that they were not at liberty to do so. *Galway v. Baker*, 5 Cl. & Fi. App. Cas. 157.

New Trial, p. 534.

The defendant being secretary of a joint-stock banking company, went with the cashier to the office of a branch bank, and was found by the plaintiff, one of the directors, moving books, &c., who thereupon gave both into custody on a charge of felony, in an action of trespass and false imprisonment, the plaintiff gave in evidence that the defendant had, on the following morning, gone to the London house and broken open the plaintiff's desk and taken away papers, which the Judge received as showing malicious motives throughout the transaction, and the defendant having on cross-examination elicited evidence showing the state of the balances of him the defendant at the county bank, but as vouchers were produced, held no ground for a new trial, nor would the Court interfere on the ground of excess of damages not appearing gross. *Edgell v. Francis*, 1 Sc. N. S. 118.

Nonsuit, p. 535.

Where the facts alleged in the declaration do not, if proved, amount to a cause of action, the Judge is not at liberty to nonsuit on that ground, but the defendant ought to demur or move an arrest of judgment. *Lumby v. Alday*, 1 Cr. & J. 301; and 1 Tyr. 217.

Circumstantial Proof, p. 559.

Where a charge depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. *Hodge's Case*, 2 Lew. Cr. Cases, 227.
